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IN THE SUPREME COURT OF THE UNITED STATES

Lamers Dairy, Inc., and
Jerome Fischer, d/b/a
Utschig Dairy,
Plaintiff-Petitioners,

vs.

Secretary of Agriculture,
Defendant-Appellee.

On appeal from the
United States Court
of Appeals for the
Seventh Circuit,
No. 78-1318
from United States
District Court for
the Eastern District
of Wisconsin,
No. 77-C-173

PETITION FOR WRIT OF CERTIORARI

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JURISDICTIONAL STATEMENT

The plaintiff-petitioners in the above named case do hereby seek review of the judgment issued and entered by the United States Court of Appeals for the Seventh Circuit on September 14, 1979.

Petitioners believe that 28 U.S.C. 1254 (1) confers on the Supreme Court jurisdiction to review the judgment in question by writ of certiorari, as quoted:

> 1254. Courts of appeals; certiorari, appeal; certified questions.
> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . ."

QUESTIONS FOR REVIEW

The issues on appeal are:

(1) Whether it is the duty of the Courts or Congress to determine whether changed circumstances relative to the constitutional provision which prohibits

the "taking of private property for public use" is applicable to the "producer settlement fund" provided by 7 U.S.C. Section 608c (5) (B) (ii) and operated under Federal Order 30 under the Agricultural Marketing Agreement Act of 1937 as amended.

(2) If it is the duty of the Court to decide whether a law is lawful under changed circumstances, then whether or not under changed circumstances, the taking of private property under 7 U.S.C. 608c (5) (B) (ii) in fact serves a public purpose.

(3) If there is in fact no public purpose served by the taking of private property under 7 U.S.C. 608c (5) (B) (ii), then whether U.S. vs. Rock Royal Cooperative, 307 U.S. 533 (1939) relative to the producer settlement fund is still valid.

CONSTITUTIONAL PROVISIONS AND STATUTES

1)Applicable constitutional law relied upon by the plaintiffs is the Fifth Amendment of the Constitution of the United States:

> " . . . nor shall private property be taken for public use without just compensation."

The provision complained of is 7 U.S.C. 608c (5) (B) (ii) which is authorized by 7 CFR Part 1030, providing

> (ii) for the payment to all aproducers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered; . . ."

OTHER APPLICABLE STATUTORY PROVISIONS

2) Federal Milk Marketing Orders are authorized by the Agricultural Marketing Agreement Act of 1937, hereinafter referred to as the "Act". Under 7 U.S.C.

Section 602, Declaration of policy, it is stated:

> It is declared to be the policy of Congress-
>
> (1) Through the exercise of powers conferred up the Secretary of Agriculture under this chapter, to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish, as the prices to farmers, parity prices as defined by section 1301 (a) (1) of this title.
>
> (2) To protect the interest of the consumer by (a) approaching the level of prices which it is declared to be the policy of Congress to establish in subsection (1) of this section by gradual correction of the current level at as rapid a rate as the Secretary of Agriculture deems to be in the public interest and feasible in view of the current consumptive demand in domestic and foreign markets, and (b) authorizing no action under this chapter which has for its purpose the maintenance of prices to farmers above the level which it is declared to be the policy of Congress to establish in subsection (1) of this section. (Emphasis added.)

3) Pooling is provided for under 7 U.S.C. 608c (5), Milk and its products; Terms and Conditions of Orders; as follows:

> "In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) no others:
> (A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a

method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers:

(B) Providing:

(i) for the payment to all producers and associations of producers delivering milk to the same handler of uniform prices for all milk delivered by them . . ."

This type of pooling provided for by 7 U.S.C. 608c (5) (B) (i) is called the individual handler pool. With this method of pooling each individual handler pays his producers (or cooperative association if this be the case) the value established according to use by the Department of Agriculture.

4) 7 U.S.C. 608c (5) (B) (ii) provides:

(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered; subject, in either case only to adjustments

for (a) volume, market, and production differentials customarily applied by handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, (d) a further adjustment to encourage seasonal adjustments in the production of milk through equitable apportionment of the total value of the milk purchased by any handler, or by all handlers, among producers on the basis of their marketings of milk during a representative period of time, which need not be limited to one year; (e) a provision providing for the accumulation and disburse ment of a fund to encourage seasonal adjustments in the production of milk may be included in an order; and (f) a further adjustment, equitably to apportion the total value of milk purchased by all handlers among producers on the basis of their marketings of milk, which may be adjusted to reflect the utilization of producer milk by all handlers in any use classification or classifications, during a representative period of one to three years, which will be automatically updated each year . . ."

7 U.S.C. 608c (5) (B) (ii) as quoted above provides that all handlers pay a price to the producer which is the market average according to use value of all handler milk within the entire market. Provisions (d), (e), and (f) provided for by the

Act are supply-demand adjustors to encourage the production of milk according to seasonal demands and discourage the production of milk in times of over-supply.

Both subparagraph (B) (i) and (ii) provide for pricing of milk in accordance with use at the handler level.

5) The pricing of milk is also controlled under 7 U.S.C. 608c (18): Milk Prices:

> "The Secretary of Agriculture, prior to prescribing any term in any marketing agreement or order, or amendment thereto, relating to milk or its products, if such term is to fix minimum prices to be paid to producers or associations of producers, or prior to modifying the price fixed in any such term shall ascertain the parity prices of such commodities. The price which it is declared to be the policy of Congress to establish in section 602 of this title shall, for the purposes of agreement, order, or amendment, be adjusted to reflect the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk or its products in the marketing area. Whenever the Secretary finds, upon the basis of the evidence adduced at the hearing required by section 608b of this title or this section, as the case may be, that the parity prices of such commodities are not reasonable in view of the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk and its products in the marketing area or, in the case of orders applying only to manufacturing milk, the production area to which the contemplated agreement, order, or amendment relates, he shall fix such prices as he finds

> will reflect such factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest. Thereafter, as the Secretary finds necessary on account of changed circumstances, he shall, after due notice and opportunity for hearing, make adjustments in such prices." (Emphasis added)

6) Other pertinent statutes under 7 U.S.C. Chapter 35 A under price supports are Section 1446b headed "Policy With Regard to Dairy Products":

> "The production and use of abundant supplies of high quality milk and dairy products are essential to the health and general welfare of the Nation; a dependable domestic source of supply of these foods in the form of high grade dairy herds and modern, sanitary dairy equipment is important to the national defense; and an economically sound dairy industry affects beneficially the economy of the country as a whole. It is the policy of Congress to assure a stabilized annual production of adequate supplies of milk and dairy products; to promote the increased use of these essential foods; to improve the domestic source of supply of milk and butterfat by encouraging dairy farmers to develop efficient production units consisting of high-grade, disease-free cattle and modern sanitary equipment; and to stabilize the economy of dairy farmers at a level which will provide a fair return for their labor and investment when compared with the cost of things that farmers buy.

Aug. 28, 1954, c. 1041, Title II, Section 204(a), 68 Stat. 899. (Emphasis added.)

7) Also pertinent is 7 U.S.C. Chapter 35A, Section 1446c; "Domestic disposal programs for dairy products:"

> "In order to prevent the accumulation of excessive inventories of dairy products the Secretary of Agriculture shall undertake domestic disposal programs under authorities granted in the Agricultural Adjustment Act of 1938 and the Agricultural Act of 1949, as amended, or as otherwise authorized by law. Aug. 28, 1954, c. 1041, Title II, Section 204(c), 68 Stat. 900."

STATEMENT OF THE CASE AND RELEVANT FACTS

Plaintiff Lamers Dairy, Inc. is a Wisconsin corporation engaged principally in the business of bottling fluid milk, distributing, and selling same to customers in and around Appleton, Wisconsin. Said plaintiff has its principal place of business at 114 South John Street, Kimberly, Wisconsin 54136; and receives its raw milk supply directly from dairy farmer-producers located nearby. Said plaintiff buys milk and sells milk in competition with other independent dairies and farmer cooperatives.

Plaintiff Jerome Fischer, d/b/a Utschig Dairy is an individual who was engaged principally in the business of bottling fluid milk, distributing, and selling same to customers in and around Appleton, Wisconsin. Said plaintiff had his place of business at 2003 North Meade Street, Appleton, Wisconsin 54911; and received his raw milk supply directly from dairy farmer-producers located nearby. Said plaintiff also bought milk and sold milk in competition with other independent dairies and farmer cooperatives.

The plaintiff-appellants are regulated under the Agricultural Milk Marketing Agreement Act of 1937 as amended (7 U.S.C. 60, et seq.) and Federal Milk Marketing Order No. 30 as amended (7 C.F.R. 1030) and are required by Federal Milk Marketing Order No. 30 to pay

substantial amounts of money which is earned in their businesses into the producer settlement fund. (See Agriculture Item No. 90 at pages 4 and 5 of the record.)

The plaintiff-appellants herein, either representing themselves or by representation, have participated in 608c (3), Promulgation Hearings, for a number of years as concerned with proposed amendments to the Federal Milk Marketing Order. The plaintiffs have often raised issues regarding the injustices and unfairness of the regulations involved. It is the plaintiffs' experience that the hearing notices were almost always kept relatively narrow in scope, thereby disallowing evidence or facts to be presented which prove inequities in the Order system as it is operated.

Failing to get any response from administrators in promulgation hearings, and as we were refused hearing on the issue in 1973, the plaintiffs refused to pay monies earned in their businesses to competitors via the producer settlement fund in an effort to seek justice in the federal courts. A 608a (6), Enforcement Proceedings, followed and the plaintiffs raised certain affirmative defenses which included pleading on the constitutional issues.

Summary judgment requested by the Department of Agriculture was refused by Judge Myron L. Gordon's court in the Eastern District of Wisconsin because he felt that genuine constitutional issues were involved and appeal was permitted to the Seventh Circuit Court at Chicago.

In the decision from the Circuit Court of Appeals for the Seventh Circuit, Judge Sprecher stated that the only forum open to the defendants, Lamers and Utschig, for the adjudication of their affirmative defenses and "even constitutional issues" is a hearing before the Secretary of Agriculture, as quoted:

> "The Supreme Court held that a defendant could not resist a claim under a 608c (6) without having pursued its administrative remedies and judicial review of the administrative decision under 608c (15). The lower courts almost without exception have followed

Ruzicka by refusing to allow 608a (6) defendants to raise any issues -- even constitutional challenges -- that have not been tried in a 608c (15) proceedings."

* * * * * * * * * * *

"The only forum open to the defendants for adjudication of their affirmative defenses is a hearing before the Secretary of Agriculture under a 608c (15)."

(United States Court of Appeals for the Seventh Circuit, Case No. 73-1889, decided July 10, 1974.) See Appendix I.

The plaintiffs subsequently filed a petition with the Department of Agriculture on July 23, 1974 and after going through a series of pleadings and hearings, etc., as outlined by administrative law Judge Baker in her decision, (Agriculture Item No. 90) the plaintiffs received the final decision on appeal from Donald Campbell, the head judicial officer on March 9, 1977, (Agriculture Item No. 98). Both decisions, Appendix I.

The plaintiffs then filed a complaint in the District Court on March 29, 1977. It should be noted that with Agriculture Item Nos. 86 through 89, the petitioners took the responsibility of representing themselves because petitioners' counsel refused to make the arguments requested by petitioners and the petitioners' attorney withdrew from the case. Later, District Court Item Nos. 17 and 18 explain that upon examination of the record on file in the District Court, that there had been no hearing transcripts supporting the plaintiffs' argument included in the file forwarded by the Department of Agriculture to the District Court level, and they had been omitted either by the plaintiffs' attorney, Mr. Roy Josten, or by the Department of Agriculture.

Subsequently the plaintiffs filed a Bill of Equity with the United States Court of Appeals for the Seventh Circuit and the Seventh Circuit refused to consider the constitutional issue under changed circumstances stating that the

matter is more properly raised before Congress.

This was an "unpublished Order".

FACTS MATERIAL TO CONSIDERATION OF QUESTIONS PRESENTED

The plaintiff-appellants will define terminology commonly used relative to the milk marketing orders as follows.

1. Producer: A producer is a dairy farmer defined under the Order at 7 CFR, Chapter X, Part 1030 -"Milk in Chicago Regional Marketing Area", Section 1030.12 as follows:

1030.12 Producer.

(a) Except as provided in paragraph (b) of this section, "producer" means any person who produces milk in compliance with the Grade A inspection requirements of a duly constituted health authority and whose milk is received at a pool plant or diverted pursuant to Section 1030.13.

Explanation: Federal Milk Marketing Orders address themselves only to Grade A milk and only fluid or bottled milk labeled Grade A is regulated by local health authorities.

2. Handler: A handler is any person in his capacity who operates a pool plant or any cooperative association with respect to producer milk which causes it to be handled or received at a pool plant.

3. Pool Plant: A pool plant is a distributing plant or a plant which receives Grade A milk and ships a certain percentage of it for fluid use in accordance with various requirements of the Order and whose milk receipts are included in the equalization pool.

4. Distributing Plant: A plant from which there is route disposition in the marketing area, either directly or through another plant, of a Grade A fluid milk product that is processed or packaged in such plant during the month.

5. Supply Plant: A plant from which Grade A fluid milk is shipped or transshipped during the month to another plant with other such provisions that are required by the Order.

6. Milk Manufacturing Plant: A plant which receives producer milk and produces manufactured milk products which are generally butter, powder, or cheese. Supply plants are generally associated with manufacturing plants in the Chicago Regional Order.

MATERIAL FACT: MARKETWIDE POOL UNDER CHANGED CIRCUMSTANCES PROVIDES SUBSIDIES TO COMPETING HANDLERS AND INEQUITABLE COMPETITION.

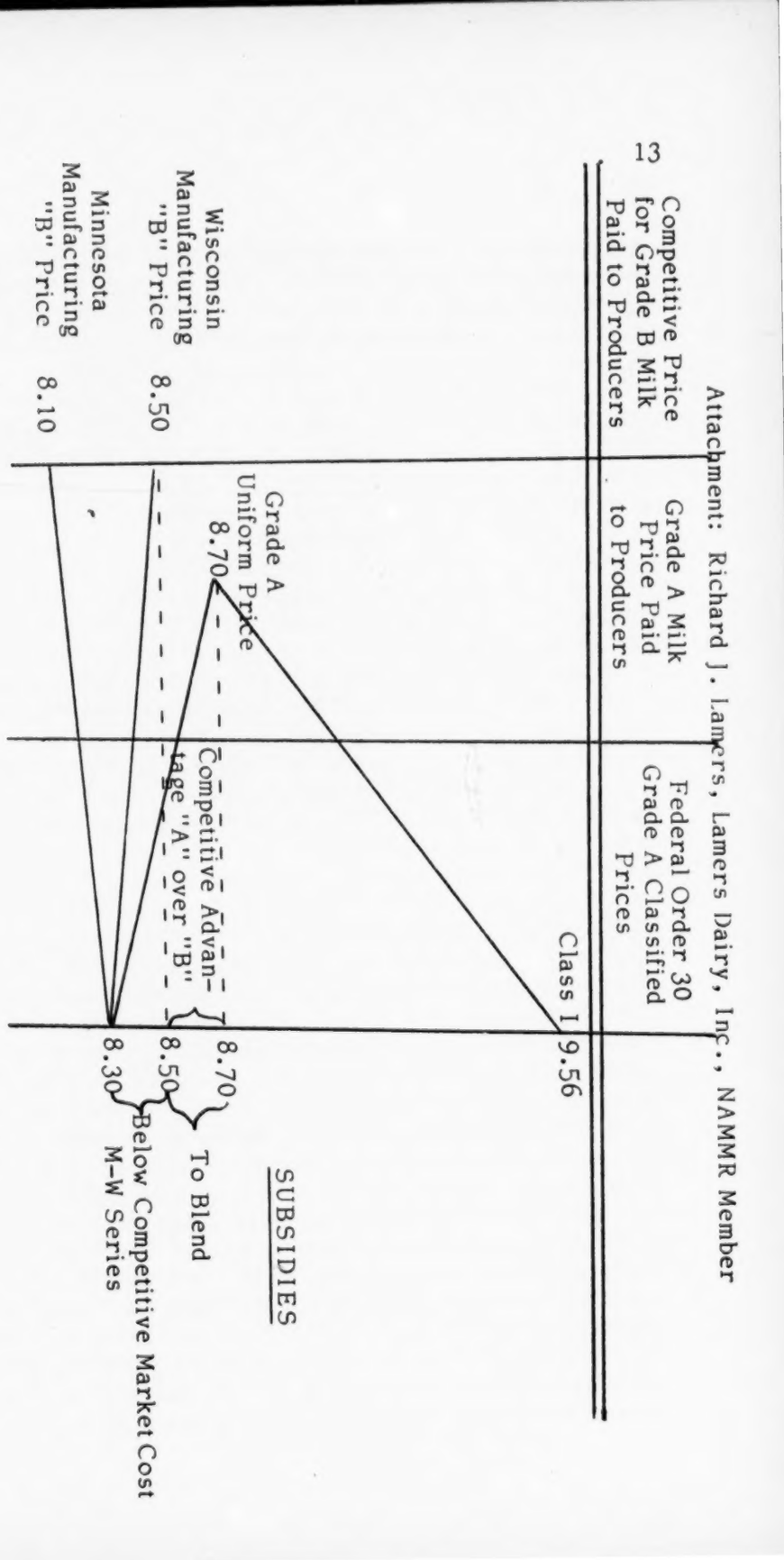
Discrimination is effected through the use of the producer settlement fund mechanism and relative pricing structures as different prices are charged for the same quality milk.

Class prices set under federal orders are controlled, rendering them noncompetitive or free from the laws of competition, which renders competitive benefits to manufacturing handlers.

For the purpose of demonstrating for the Court comparative price levels, the plaintiffs will resubmit Exhibit 2 of District Court Item No. 5, now shown on page 13 of this petition, which was an exhibit presented to a Congressional Hearing approximately July 1, 1976 regarding the Minnesota-Wisconsin Price Series as related to federal order milk pricing.

Referring to this exhibit, the first column headed Competitive Price for Grade B Milk Paid to Producers is an example of the price actually paid for Grade B manufacturing milk in Wisconsin and Minnesota at $8.50 and $8.10 respectively. The establishment of the Minnesota-Wisconsin Series price averages these two prices to $8.30, which is seen in the third column under Federal Order 30 Grade A Classified Prices. The $8.30 i.e. M-W Series, is the price according to use charged to handlers for Class III milk. The Court will notice that the M-W Series averages 20¢ below the Wisconsin manufacturing Grade B milk price of $8.50. Having established the Class III price for Grade A milk used for manufacturing at $8.30, the Class I differential of $1.26 is added to come up with a Class I cost of Grade A milk for fluid purposes of $9.56, which is seen at the top of the

Attachment: Richard J. Lamers, Lamers Dairy, Inc., NAMMR Member



third column. The purpose of the Class I differential is to increase the price paid for Grade A milk so as to compensate producers for the production of Grade A milk so as to insure the consuming public of an adequate supply in accordance with the requirements of the Act.

Accordingly, as is seen by this graph, the price that farmers receive for Wisconsin manufacturing milk is $8.50 on the open competitive market. The competitive price that producers receive for Grade A milk is the base uniform price of $8.70 as is shown on the graph, plus other competitive premiums which are not shown on this graph. The competitive Grade A premiums are not shown because they are premiums which are paid over and above the uniform blend price beyond the point of price regulation. The Class III price, as stated before, is the $8.30 M-W Series price, which is the price for which manufacturers can buy Grade A milk for manufacturing purposes under the regulation, granting them a subsidy of 20¢ below the Wisconsin Grade B manufacturing price and a subsidy of 40¢ to pay the uniform blend price to producers. This money comes only from the Class I fluid handler operations.

MATERIAL FACTS

The Agricultural Adjustment Act of 1938 was amended in 1954 to provide for the price support of dairy products which supports the price paid to producers for all milks. The price support is set at levels provided to assure the consuming public of adequate supplies of dairy products and is reviewed by Congress every six months thereby preventing producer competition from lowering the price of milk to levels below that set by the price support system which price support is designed to assure farmers of an adequate income. See 7 U.S.C. 1446b quoted above.

MATERIAL FACT: The price support system supports the M-W Series by putting a floor under it although the M-W Series can and does rise above the price support level. Class II-III prices under the orders are set at the M-W Series level.

MATERIAL FACT: The M-W Series level is usually below Grade B manufacturing market competitive prices paid in Wisconsin, thereby enabling Grade A manufacturers

to purchase Grade A milk to be used for manufacturing purposes at levels below the open market "B" prices while paying his producers the Grade A blend price and being subsidized to the level of the blend price by the Class I fluid handler.

MATERIAL FACT: Milk quality has greatly increased enabling three to four days storage of raw milk versus not more than one day in 1939. Production fluctuations have minimized and milk refrigerated transportation and highway systems enable milk to be transported hundreds of miles a day versus less than one hundred miles in 1939.

MATERIAL FACT: This blend pricing situation causes disorderly marketing in the following manner. As the amount of milk which can be qualified for pooling is dependent upon a percentage which is utilized in Class I and as under the marketwide pooling system, three to four times in excess of the amount of milk needed in Class I may be qualified for pool, and as this excessive Grade A milk can be purchased under regulation at Grade B prices and below, resulting in competitive benefits to the regulated manufacturing handler, it results in:

1) Handlers who are primarily in manufacturing but also in fluid competition will sell bottled milk in the Class I market at cost or below because of the subsidies made up on the manufacturing end of the market relative to pool qualifying percentages.

2) Cooperatives will contract or arrange with other manufacturing supply plants to provide pool qualifying mechanisms allowing them to become a part of the pool with the provision that the manufacturing plant charge Class I prices to handlers as announced by the cooperatives, which includes setting milk prices at above minimums established by the federal orders. The cooperative does this by arranging for the manufacturing plant to sell a portion of his milk to a fluid milk handler, which in turn does two things for the cooperative; a) it prevents other possible sources of Grade A milk from competing with the cooperative for the sale of milk to Class I handlers at below the prices established by the cooperative, and b) it frees some of the cooperative's own milk from the Class I fluid milk market, making it available to their

own manufacturing facilities for profit.

3) It causes backhauling practices. A manufacturing plant will sell milk to a distributing plant and then at a later point in time, which time varies with Order regulations, milk is backhauled to the manufacturing plant for manufacturing purposes. The manufacturing plants will pay qualifying kickbacks to distributing plants because the sale of milk to the distributing plant enables the manufacturing plant to partake in the pool and also retain the milk for manufacturing purposes.

4) The subsidies received by manufacturing plants from the producer settlement fund under the pool results in competitive premiums being paid by manufacturing plants over and above Grade A blend prices in order to attract Grade A milk to their facilities to be used for manufacturing purposes. The result is that a fluid handler must pay additional premiums over and above the Class I prices he is charged under the federal orders in order to retain his supply of milk.

5) A fluid handler, who we will call Handler A, who does not go with the cooperative over-order pricing schemes, then finds his competitor, who we will call Handler B, buying milk for Class I utilization from the cooperatives at "only" the Class I price levels. This is done for the purpose of enabling Handler B to undersell Handler A at the wholesale and retail market so as to eliminate him from the marketplace.

6) The pricing and pooling mechanisms described above provide for monopoly pricing of milk in the marketplace and have resulted in excessively high prices being charged for Class I milk for the purpose of gaining more money in subsidies to support the below competitive level prices for Grade A milk used in manufacturing.

7) The above has also resulted in excessive amounts of Grade A milk being drawn into the federal milk marketing system in the approximate amount of 70% in excess milk.

8) Excessive Class I prices have caused reduced consumer consumption which is detrimental to both fluid handlers and the producers.

9) Excessive prices have contributed to inflationary

prices for the cost of bottled milk, which cost is in part being used to subsidize the cost of milk for manufactured products.

MATERIAL FACT: Producers switch from Grade B milk production to Grade A milk production for about 15¢ to 20¢ per hundredweight price incentive over the manufacturing prices. There is no difference in the material cost of producing Grade A milk versus Grade B milk. The only difference lies in the effort required for a farmer to do a cleaner job of producing and handling the milk. Twenty cents per hundredweight as compared to the Class I differential of $1.26 under the federal orders plus super pool premiums and competitive premiums placed on top of the $1.26 is positive proof that the marketwide pool is being used as a manipulative tool for the purpose described above.

MATERIAL FACT: The producer settlement fund is no longer used as a common fund to protect producer income for the purpose of insuring the consuming public of an adequate supply of fluid milk by preventing competition among producers. This purpose was taken over by the price support system in 1954.

MATERIAL FACT: The producer settlement fund is being used to attract milk for manufacturing purposes. The purpose of the Class I differential is to attract milk for fluid use and the producer settlement fund contradicts and nullifies that purpose because the fluid handlers cannot buy Grade A milk for fluid use at blend prices.

MATERIAL FACT: While the price support system provides a floor for all milk prices, in the absence of a producer settlement fund, the laws of free competition for producer milk for bottling purposes would reduce the Class I prices for fluid purposes to realistic levels required to sustain a supply of milk to the fluid portion of the industry versus the manufacturing portion of the industry. The laws of free competition would also then increase the Class III levels of Grade A milk used for manufacturing purposes to the realistic level that would provide producer returns comparable to competitive market value. Again, the price support system prevents the prices paid for milk to be used in manufacturing from

dropping below the levels established by Congress which are reviewed every six months for the purposes indicated under 7 U.S.C. 1446b.

MATERIAL FACT: The "producer settlement fund" is a misnomer. Funds are transferred from one handler to another as opposed to among producers. In reality, producers will ship their milk to the handler who gives him the better overall price and the producer has no realization of any effect of class prices in the Order and he is not interested in them. It is really a handler settlement fund.

MATERIAL FACT: The only orderly marketing accomplished by the producer settlement fund is the elimination of producer competition to sell milk to the fluid market, which violates laws of free competition. It does nothing to alleviate or change any problems in the handling of surpluses, but rather creates problems in the handling of surpluses. The administration does not arrange the disposal of surpluses. This is done by the handlers only.

MATERIAL FACT: The solely fluid milk handler who has his entire investment tied into the fluid portion of the business, has no chance to equitably compete while providing subsidies to his competitors.

All of the above stated facts are established by the record and acknowledged by studies by the Department of Justice on milk marketing, by the Norris Committee, by expert witness testimony and studies which will be substantiated in the petitioners-appellants' brief on the merits upon a granting of a writ of certiorari.

BASIS OF JURISDICTION

This action is brought under the authority of 608c (15)(A) and (B) as follows:

(15) Petition by handler for modification of order or exemption; court review of ruling of Secretary.

(A) Any handler subject to an order may file a written petition with the Secretary of

Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

(B) The District Courts of the United States in any district in which such handler is an inhabitant, or has his principal place of business, are vested with jurisdiction in equity to review such ruling, provided a bill of equity for that purpose is filed within twenty days from the date of the entry on such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. The pendency of proceedings instituted pursuant to this subsection (15) shall not impede, hinder, or delay the United States or the Secretary of Agricutlure from obtaining relief pursuant to section 608a (6) of this title. Any proceedings brought pursuant to section 608c (6) of this title (except where brought by way of counterclaim in proceedings instituted pursuant to subsection (15)) shall abate whenever

a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this subsection (15).

REASONS FOR ALLOWANCE OF WRIT

The Supreme Court of the United States in Nebbia v. New York, 291 U. S. 502 (1938) at page 525 says:

> "The Fifth Amendment in the field of federal activity and the Fourteenth Amendment as respects state action do not prohibit governmental regulation for public welfare. They merely condition that the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guarantee of the due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the objects sought to be attained. It results that a regulation valid for one sort of business, or in given circumstances, may be invalid for another sort, or for the same business under different circumstances, because the reasonableness of each regulation depends upon the relevant facts."(Emphasis added)

The "taking of private property without just compensation", as is done by the producer settlement fund, as a means "to assure the consuming public of adequate supplies", under the changed circumstances of today's market, is in question.

This question, under changed circumstances, has not been settled by the Supreme Court. Circumstances have changed so drastically that abuse of the law has created monopoly power with the assistance of the Federal Milk Marketing Order system and the producer settlement fund no longer serves the public purpose as was originally

intended by Congress as seen by the Supreme Court in U. S. v. Rock Royal in 1939.

THE CONSTITUTIONAL QUESTION

The plaintiff-petitioners believe that the Circuit Court erred in stating that changed circumstances relative to the vitality of the Supreme Court's decision in Rock Royal are properly addressed to Congress rather than to the Federal Courts. The Circuit Court overlooks the Supreme Court philosophy relative to the same in Nebbia v. New York, while relying on language excerpted from National Broiler Marketing Ass'n v. United States, ___ U.S. ___, 98 S. Ct. 2122, 2130 (1978). The Circuit Court stated in the decision:

> "We regard plaintiffs' arguments in this context to be properly addressed to the Congress, not the federal courts. As the Supreme Court stated in a recent decision involving a similar contention under the Capper-Volstead Act, Title 7 U.S.C. Section 291 and 292:
>
> > We may accept the proposition that agriculture has changed in the intervening 55 years, but, as the second Mr. Justice Harlan said, when speaking for the Court in another context, "a statute is not an empty vessel into which this Court is free to pour a vintage that we think better suits present-day tastes." United States v. Sisson, 399 U.S. 267, 297, 90 S. Ct. 2117, 2133, 26 L.Ed. 608 (1970). Considerations of this kind are for Congress, not the courts." National Broiler Marketing Ass'n v. United States, ___ U.S. ___, 98 S. Ct. 2122, 2130 (1978)."

The United States v. Sisson case involved a draftee refusing to go the draft on the grounds that the Viet Nam War was immoral, and in the National Broiler Marketing Ass'n case, the National Broiler Marketing Association

was jobbers marketing broiler chickens, and the Association was being charged by the Justice Department with price fixing. The Association claimed exemption under the protection of the Capper-Volstead Act which allows farmers to set prices for their commodities produced on the farm; and the Association, as jobbers, claimed that that immunity extended to themselves or that the courts should allow them to be classified under the Capper-Volstead Act. The Supreme Court declined, stating that the Capper-Volstead Act applied to farmers as the grower of the product and it was in this context that the Supreme Court declined to exempt the Association from anti-trust laws stating that considerations of this kind were for Congress and not the Courts.

Neither of these cases cited by the Circuit Court involve the constitutional question under changed circumstances. They involve statutory provisions and do not involve the taking of private property.

In Shoemaker v. U.S., Dist. Col. 1893, 13 S. Ct. 361, 147 U. S. 298, 37 L. Ed. 170 it is stated:

> "The courts have power to determine whether the use for whichprivate property is authorized by the legislature to be taken is in fact a public use." (Emphasis added.)

In City of Dayton v. Borchers, 1967, 232 N. E. 2d 437, 13 Ohio Misc. 273 it is stated:

> "Questions of whether taking was for public use and was necessary are questions for the courts."

In Application of Texas Co., D. C. Ill. 1939, 27 F. Supp. 847 it is stated:

> "If the discretion of federal public administrative officials is exercised in such an arbitrary or unjust and discriminating manner as clearly to deny to individuals their right to the equal protection of the laws or to due process of law, or any other constitutional right, federal courts may intervene and may hold unconstitutional any attempt of the Legislature to vest in administrative officials a discretion that is essentially arbitrary in character."

Accordingly, the Circuit Court in its view that changed circumstances relative to a constitutional issue are to be reviewed by Congress rather than by the courts, has decided a federal question in a way contrary to applicable decisions of the Supreme Court. It has also decided an important question of federal law which has not been, but should be, settled by the Supreme Court.

Relative to the Application of Texas Co. case, the plaintiff-petitioners were granted a hearing under administrative remedies procedure and the plaintiffs brought in seven witnesses to testify, including expert witness Dr. Roland W. Bartlett, and all testimony was received into hearing record. Head Judicial Officer Donald Campbell refused to admit this testimony as evidence. Changed circumstances relative to constitutional issues were presented. Likewise, Central Milk Producers Cooperative was issued a subpoena to testify and the cooperative moved to quash, stating the information sought was in the nature of a "business secret".

CHANGED CIRCUMSTANCES RELATIVE TO ROCK ROYAL

The Supreme Court under Rock Royal in 1939, held that the producer settlement fund was constitutional under the due process clause and the taking was for public purpose. In order to determine changed circumstances, we must necessarily examine the circumstances in 1939 to discover whether or not the public purpose which existed in 1939 for which the private properties were taken exists in today's market. If in fact the situation does not exist, one must then examine if there is any public purpose served at all by the taking of private property today.

We will first look at the relevant portion of Rock

Royal set out by the Circuit Court in their opinion at page 2 in which they say it is "dispositive" of this appeal without considering the changed circumstances:

> "The defendants' objection * * * is to the alleged deprivation of liberty and property accomplished by the pooling requirement in taking away from the defendants their right to acquire milk from their patrons at the minimum class price, according to its use, and forcing the handlers to pay their surplus, over the uniform price, to the equalization pool instead of to their patrons. This argument assumes the validity of price regulation, as such, but denies the constitutionality of the pooling arrangement because handlers are not at liberty to pay the producer in accordance with the use of the producer's milk but must distribute the surplus to others whose milk is resold less advantageously. It is urged that to carry this principle of contribution to its logical conclusion would mean that the wages of the employed should be shared with the unemployed; the highly paid, with the underpaid; and the receipts of the able, the fortuanate and the diligent, with the incompetent, the unlucky and the drone." 307 U.S. at 572. (Emphasis added.)

The Supreme Court responded to this contention and upheld the producer settlement fund as follows:

> "No such exaggerated equalization of wealth and opportunity is proposed. The pool is only a device reasonably adapted to allow regulation of the interstate market upon terms which minimize the results of the restrictions. It is ancillary to the price regulation designed, as is the price provision, to foster, protect and encourage interstate commerce by smoothing out the difficulties of the surplus and cutthroat competition which burdened this marketing. In Mulford v. Smith, we made it clear that volume of commodity movement might be controlled or discouraged. As the Congress would have, clearly, the right to permit only limited amounts of milk to move in interstate commerce, we are of the opinion it might permit the movement on terms of pool settlement here provided. Common funds for equalizing risks are not unknown and have not been considered violative of due process. The pooling principle was upheld in workmen's compensation, bank deposit insurance, and distribution of benefits in the Transportation Act."

307 U.S. at 572-573 (footnotes omitted)(emphasis added).

THE ROCK ROYAL ERA WAS VASTLY DIFFERENT

One must first keep in mind that today's marketing structure is wholly different from that which existed in 1939. Both Grade A and manufacturing milk quality standards are much higher than those of 1939. The bacteriological counts are much lower and the keeping quality is much enhanced, enabling Grade A raw milk to be stored for a period of two to four days under proper refrigeration. This is accomplished with pipeline milking and the bulk milk handling facilities which are now predominant in the market, and along with the highway and transportation systems available, the problems of handling variations and surplus in the daily milk demands of the fluid market are minimal.

CHANGES IN CIRCUMSTANCES relative to Rock Royal in 1939 are as follows:

1) In the 1939 New York consumer market, fluid milk prices were controlled at both the wholesale and retail level. In today's Chicago Order 30 market, there are no price controls at the wholesale or retail level.

and the markets are strictly competitive.

2) Surplus fluctuations are much less in today's market than they were in 1939,and with increased quality of milk enabling good Grade A raw milk to be stored for a period of three to four days, the disposal problem that existed in 1939 where milk had to be disposed of daily is not the case under today's marketing situation.

3) The court in Rock Royal was of the opinion that no handler would have an interest in the producer settlement fund and that it would be equitable. As seen above, this is not true in today's market. In today's market, with price levels controlled in a manner and fashion that they are and the resulting subsidies that are obtainable through the producer settlement fund, handlers do have a financial interest in the settlement fund which is a very important changed circumstance relative to the thinking of the court in the days of Rock Royal.

4) In 1939, the producer settlement fund was used as a common fund to prevent cut-throat competition among producers and the blend mechanism was viewed as a tool to prevent this and thereby assure the consuming public of an adequate supply of milk for the New York market. As seen above, today this purpose no longer exists with the producer settlement fund as it has been underwritten by the price support system under the Act as amended in 1954. As quoted above, under 7 U.S.C. Section 1446b, it is stated:

> ". . .It is the policy of Congress to assure a stabilized annual production of adequate supplies of milk and dairy products; to promote the increased use of these essential foods; to improve the domestic source of supply of milk and butterfat by encouraging dairy farmers to develop efficient production units consisting of high-grade, disease-free cattle and modern sanitary equipment; and to stabilize the economy of dairy farmers at a level which will provide a fair return for their labor and investment when compared with the cost of things that farmers buy."

The consequence of this stated congressional purpose is that the level of price supports are reviewed by Congress every six months and the price support level is updated and adjusted accordingly. 7 U.S.C. Section 1446c authorizes the purchase of dairy products to accomplish this end. With the price support system operating and being in effect as it has been since the amendment in 1954, there can be no cut-throat competition among producers which will endanger adequate supplies of milk to the consuming public.

5) As the price support system sets the base price of all milk, there are social costs nationally of federal order regulation which are summarized by the Department of Justice study on milk marketing which summarizes the social costs of the regulation in total dead weight losses at $125 - $245 million per year and transfer payments, which are costs of subsidation by fluid handlers and consumers to manufacturers at $250 - $500 million per year.

All of these very important changed circumstances result in the consequence that the "purpose" for which private property was taken in 1939 no longer exists or is even possible to exist with the 1954 amendment. The inequities involved in the system truly show, as God is our witness, that the producer settlement fund in today's market violates the constitution of the United States because there is no justifying public purpose.

The taking of private property for competitors' use in a competitive market thereby granting competitive advantages is prohibited by due proces of law and the courts must consider that prohibition. The Secretary of Agriculture has been well aware of these abuses for many years and the decisions which have allowed these abuses to take place are arbitrary and capricious. The Supreme Court said in Key No. 76 Miranda v. State of Arizona, 86 S. Ct. 1602, (1956):

> "Where the rights secured by the Constitution are involved, there can be no rule-making or legislation which would abrogate them."

Unfair competition has reduced the number of bottling plants to monopolistic levels and monopolies greatly en-

danger our democratic free enterprise system. The facts are that the blend mechanism in the producer settlement fund is no longer applicable to today's market but in fact is being used to produce artificial price enhancement for purposes of subsidy resulting in inflationary prices and added costs to consumers of fresh bottled milk.

In State ex rel. Herman v. Southern Pacific Co., 1969, 445 F. 2d 186, 8 Ariz. App. 238 it is stated:

> "Prohibition against taking private property for public use without just compensation is designed to protect not only landowner's property interest but also his economic interest."

The arguments presented above will be argued in detail in the plaintiff-petitioners' brief on the merits upon the granting of a writ of certiorari by the Supreme Court.

It is the prayer of the plaintiff-petitioners that the Supreme Court grant the Writ of Certiorari as it is urgently needed because of the inequitable competitive situation that all in the fluid milk industry are faced with.

Federal milk marketing orders came into Milwaukee, Madison, and northeastern Wisconsin about 1953, and including the Chicago market in 1963, according to administration officials, there were approximately 185 independent dairies. Today there are only 34 independent dairies left in the same area, and even as this case was in progress, Jerome Fischer d/b/a Utschig Dairy, was forced to close its doors. The independent dairies have to be more efficient than our cooperative competitors in order to merely survive.

In the Lake Winnebage-Fox Cities - Green Bay metropolitan area of northeastern Wisconsin there are only four independent dairies left, whereas in the late 1950's there were approximately 25 independent dairies. The rest have all been forced out of business or were bought out be cooperatives. As can be seen above, it can be understood how the federal order system and the marketwide pool can be used to accomplish this end.

The plaintiff-petitioners have always believed the United States to be a country under God, with liberty and justice for all, but we can only sustain this belief if our constitutional rights are upheld.

Respectfully submitted this 6th day of December, 1979, at Kimberly, Wisconsin.

Richard J. Lamers

Richard J. Lamers
Pro Se Plaintiff-Petitioner
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Kimberly, Wisconsin 54136

Jerome A. Fischer

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APPENDIX I

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UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
Argued: January 10, 1979

Entered on : Sepember 14, 1979

Unpublished order not to be cited per Circuit Rule 35

Before
Hon. Luther M. Swygert, Circuit Judge
Hon. William J. Bauer, Circuit Judge
Hon. William G. East, Senior District Judge*

LAMERS DAIRY, INC., and JEROME FISCHER, d/b/a UTSCHIG DAIRY,
Plaintiff-Appellants,
No. 78-1318 vs.
SECRETARY OF AGRICULTURE,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Wisconsin.
No. 77-C-173
Robert W. Warren, Judge.

ORDER

Plaintiffs appeal from the order of the district court granting summary judgment in favor of the Secretary. The plaintiffs' complaint sought a review of a final decision of the Secretary dismissing plaintiffs' petition challenging the validity of certain provisions of Federal Milk Order No. 30 issued by the Secretary under the Agricultural Marketing Agreement Act of 1937, as amended. (Title 7 U.S.C. 601, et seq.) The sole issue on appeal is whether the producer-settlement fund provided for by Section 8c (5) of the Act and that portion of the Order relating to the establishment of such a fund for the Chicago regional marketing area is constitutional. Plaintiffs contend that the operation of this fund results in the taking of private property without just compensation in violation

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* The Honorable William G. East, Senior District Judge of the United States District Court for the District of Oregon, is sitting by designation.

of the Fifth Amendment to the United States Constitution. We are unpersuaded by the arguments advanced in support of this contention, and accordingly affirm the judgment for the reasons set forth below.

We regard the Supreme Court's decision in United States v. Rock Royal Co-operative, Inc., 307 U.S. 533 (1939), as dispositive of this appeal. The constitutionality of the producer-settlement fund provided for by Congress in Section 8c(5) of the Act was expressly approved by the Court in Rock Royal. Indeed, plaintiff's challenge to the Act's provision for a producer-settlement fund and to the collateral provisions of Order No. 30 governing the operation of the fund is virtually identical to the contentions advanced by the defendants in Rock Royal:

> The defendants' objection * * * is to the alleged deprivation of liberty and property accomplished by the pooling requirement in taking away from the defendants their right to acquire milk from their patrons at the minimum class price, according to its use, and forcing the handlers to pay their surplus, over the uniform price, to the equalization pool instead of to their patrons. This argument assumes the validity of price regulation, as such, but denies the constitutionality of the pooling arrangement because handlers are not at liberty to pay the producer in accordance with the use of the producer's milk but must distribute the surplus to others whose milk was resold less advantageously. It is urged that to carry this principle of contribution to its logical conclusion would mean that the wages of the employed should be shared with the unemployed; the highly paid , with the underpaid; and the receipts of the able, the fortunate and the diligent, with the incompetent, the unlucky and the drone.

307 U.S. at 572 (emphasis added). The Supreme Court responded to this contention and upheld the producer-settlement fund as follows:

> No such exaggerated equalization of wealth and opportunity is proposed. The pool is only a device reasonably adapted to allow regulation of the interstate market upon terms which minimize the results of the restrictions. It is ancillary to the price regulation designed, as is the price provision, to foster, protect and encourage interstate commerce by smoothing out the difficulties of the surplus and cut-throat competition which burdened this marketing. In Mulford v. Smith, we made it clear that volume of commodity movement might be controlled or discouraged. As the Congress would have, clearly, the right to permit only limited amounts of milk to move in interstate commerce, we are of the opinion it might permit the movement on terms of pool settlement here provided. Common funds for equalizing risks are not unknown and have not been considered violative of due process. The pooling principle was upheld in workmen's compensation, bank deposit insurance, and distribution of benefits in the Transportation Act.

307 U.S. at 572-573 (footnotes omitted) (emphasis added). We are aware of no persuasive authority to the contrary, and conclude, as did the district court, that the producer-settlement fund is not violative of the Fifth Amendment. See United States v. Chase, 281 F.2d 225 (7th Cir. 1960).

Nor are we persuaded by plaintiffs' argument that this Court should decline to follow the decision in Rock Royal on the ground that its vitality has been eroded by economic changes in the dairy industry during the forty years since the Supreme Court decided that case. We regard plaintiffs' arguments in this context to be properly addressed to the Congress, not the federal courts. As

the Supreme Court stated in a recent decision involving a similar contention under the Capper-Volstead Act, Title 7 U.S.C. 291 and 292:

> We may accept the proposition that agriculture has changed in the intervening 55 years, but, as the sencond Mr. Justice Harlan said, when speaking for the Court in another context, "a statute is not an empty vessel into which this Court is free to pour a vintage that we think better suits present-day tastes." United States v. Sisson, 399 U.S. 267, 297, 90 S. Ct. 2117, 2133, 26 L.Ed. 608 (1970). Considerations of this kind are for Congress, not the courts.

National Broiler Marketing Ass'n v. United States, ____ U.S. ____, 98 S.Ct. 2122, 2130 (1978).

The judgment appealed from is affirmed and the Clerk of this Court is directed to enter judgment accordingly.

AFFIRMED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

LAMERS DAIRY, INC., and
JEROME FISCHER d/b/a
UTSCHIG DAIRY,
Plaintiffs,

vs. Case No. 77-C-173

BOB BERGLANT, Secretary
of Agriculture of the United
States of America,
Defendant.

MEMORANDUM AND ORDER

On October 25, 1977, the plaintiffs filed a motion to reconsider this Court's order of September 28, 1977, granting summary judgment for the defendant. An amendment to this motion was filed on December 27, 1977. Plaintiffs have asked for oral arguments on this motion. The Court finds that oral arguments are not necessary and that the issue can be decided on the basis of the briefs submitted.

Plaintiffs contend that the producer settlement fund provided for by section 8(c) (5) of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 608c (5)) is unconstitutional. Plaintiffs argue that the operation of this fund results in the taking of private property for public use without just compensation in violation of the Fifth Amendment to the U. S. Constitution.

This argument was considered by the United States Supreme Court in United States v. Rock Royal Cooperative, 307 U.S. 533 (1939). This decision does not support the plaintiffs' position. In Rock Royal, the Court held that Congress had the authority to establish such a producer settlement fund. The Court stated:

> Common funds for equalizing risks are not unknown and have not been considered violative of due process. Id. at 573.

This Court, therefore, finds that the producer settlement fund is not violative of the Fifth Amendment. Plaintiffs' motion for reconsideration must be and is hereby denied.

So ordered this 6th day of January, 1978, at Milwaukee, Wisconsin.

Robert W. Warren
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

LAMERS DAIRY, INC., and
JEROME FISCHER d/b/a
UTSCHIG DAIRY,
Plaintiffs,

vs. Case No. 77-C-173

BOB BERGLAND, Secretary
of Agriculture of the United
States of America,
Defendant.

MEMORANDUM AND ORDER

This civil action is an appeal by the plaintiffs under section 8c (15)(B) of the Agricltural Marketing Agreement Act of 1937 as amended, 7 U.S.C. 601 et. seq. (hereinafter referred to as the Act), of a ruling by the Judicial Officer of the United States Department of Agriculture dismissing plaintiffs' petition which was brought under Section 8c (15) (A) of the Act. Final Administrative authority to decide the Department's cases, subject to the Administrative Procedure Act, has been delegated to the Judicial Officer. 38 F.R. 10795; 42 F.R. 4385; Brown v. United States, 367 F.2d 907 (10th Cir. 1977); cert. denied, 387 U.S. 917 (1966).

On May 27, 1977, the defendant, Bob Bergland, Secretary of Agriculture filed a motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

Sections 8c (15)(A) and (B) of the Act provide:

> (15)(A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition,

in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

(B) The District Courts of the United States in any district in which such handler is an inhabitant, or has his principal place of business, are vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. If the Court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. The pendency of proceedings instituted pursuant to this subsection (15) shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to section 608a (6) of this title. Any proceedings brought pursuant to section 608a (6) of this title (except where brought by way of counterclaim in proceedings instituted pursuant to this subsection) shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this subsection (15).

In an appeal proceeding brought pursuant to 7 U.S.C. 608c (15)(B), the district court is limited to determining

whether the ruling of the Secretary is "in accordance with law." Lewes Dairy, Inc. v. Freeman, 401 F.2d 308 (3d Cir. 1968), cert. denied, 394 U.S. 929 (1969); Freeman v. Hygeia Dairy Co., 326 F.2d 271 (5th Cir. 1964); C.J. Wieland & Son Dairy Products Co. v. Wickard, 68 F. Supp. 93 (E.D. Wis. 1946).

The district court only determines whether the decision rendered by the Secretary is supported by substantial evidence and will not determine the issue de novo upon the merits. Chiglades Farm, Ltd. v. Butz, 485 F.2d 1125, (5th Cir. 1973), cert. denied, 417 U.S. 968 (1974); Lewes Dairy, Inc. v. Freeman, supra. The court in Lewes stated:

> The role of the District Court is quite narrow; it must assure itself that the petitioning party has been accorded due process in the administrative proceedings. In so doing, the administrative record is reviewed to determine whether the decision rendered therefrom is supported by substantial evidence. The Districe Court is not free to draw its own imdependent inferences and conclusions from the record. 401 F.2d at 317.

FINDINGS OF FACT

In his decision and order of March 9, 1977, the Judicial Officer made the following findings of fact

> 1. Petitioner Lamers Dairy, Inc., is a Wisconsin corporation engaged principally in the business of bottling fluid milk for distribution and sale to retail customers in and around the Appleton, Wisconsin, metropolitan area. Said petitioner has its place of business at 114 South John Street, Kimberly, Wisconsin 54136, and receives its raw milk supply directly from dairy farmer producers. Richard J. Lamers is the president and chief executive officer of said petitioner. All of said petitioner's sales are within the State of Wisconsin.

2. Petitioner Jerome Fischer, d/b/a Utschig Dairy, is an individual engaged principally in the business of bottling fluid milk for distribution and sale to retail customers in and around the Appleton, Wisconsin, metropolitan area. Said petitioner has his place of business at 2003 North Meade Street, Appleton, Wisconsin 54911, and receives his raw milk supply directly from dairy farmer producers. All of said petitioner's sales are within the State of Wisconsin.

3. Since July 1, 1968, petitioners have been determined to be handlers under Order No. 30 by the Federal Milk Market Administrator of the Order, who is the agent for the Secretary and charged with the administration of the Order. Petitioners had been regulated handlers pursuant to the provisions of Order No. 45 (Northeast Wisconsin) prior to July 1, 1968.

4. Petitioners are in competition with cooperative associations of milk producers and other independent handlers for their supply of Grade A raw milk from dairy farmers and in selling at retail and wholesale bottled fluid milk and milk products within the vicinity of Appleton, Wisconsin.

5. As a result of public hearings held upon a proposed Order, and on proposed amendments thereto, regulating the handling of milk in the Chicago Regional marketing area, the Secretary of Agriculture found that all milk and milk products as defined in the Order are in the current of interstate commerce or directly burden, obstruct, or affect interstate commerce in milk or its products.

DISCUSSION

In their complaint, plaintiffs raise numerous issues of law, several of which were raised in their petition to

the Secretary of Agriculture. However, plaintiffs have raised some issues which were not included in their petition to the Secretary or raised before the initial trier of facts. Specifically, in Paragraph 6, they state that the Secretary refused to permit a hearing on certain proposals they made in 1973 and 1976. The Secretary's denial of plaintiffs' 1976 request was sent on May 25, 1976, after the administrative record in issue here was closed. With respect to the 1973 request, plaintiffs had an opportunity to raise this in its original complaint filed in 1974 but did not do so.

In paragraph 10 of their complaint, plaintiffs state that Class II and Class III milk prices are too low resulting in competitive advantages to plaintiffs' competitors. Paragraphs 11 and 12 of their complaint challenge Order 30 and its manner of adoption and entire implementantion. In the original and amended petition filed before the Secretary, only specific provisions of the order were challenged. Thus, the administrative law judge only dealt with these specific provisions. Section 608c (15) (A) requires a written petition to be filed when challenging an order. After a hearing, the Secretary makes a ruling based on this petition.

Because none of these issues were raised in the petition filed before the Secretary and, therefore, not ruled upon by the administrative law judge, plaintiffs may not raise their issues before this Court. United States v. Mills, 315 F.2d 828, reh. den., 317 F.2d 764 (4th Cir. 1963), cert. denied, 375 U.S. 819 (1963); Sunnydale Farms, Inc. v. Freeman, 213 F. Supp. 773 (E.D.N.Y. 1963).

The Court will now consider the issues raised by the plaintiffs in their amended petition filed before the Secretary.

The plaintiffs challenge the right of producer cooperatives to propose marketing orders and to vote for their membership on marketing order referenda when such a right allegedly gives them a competitive advantage. Plaintiffs also question whether a solely intrastate handler should be exempted from the regulations and whether the provisions of the order regarding the

establishment and operation of the "producer settlement fund" are valid. The remaining issues are whether the provisions of the Order relating to Class I pricing and the pool plant performance requirement for supply plants are in accordance with law. The Court will now address these issues.

Producer cooperatives are given certain rights in the Act. Section 8c (12), 7 U.S.C. 608c (12), provides in pertinent part:

> . . .the Secretary shall consider the approval or disapproval by any cooperative association of producers, bona fide engaged in marketing the commodity or product thereof covered by such order, or in rendering services for or advancing the interests of the producers of such commodity, as the approval or disapproval of the producers who are members of, stockholders in, or under contract with, such cooperative association of producers.

In H. P. Hood & Sons v. United States, 307 U.S. 588, 599 (1939), the United States Supreme Court addressed the issue of cooperatives having the right to vote for their members.

> Section 8c(12) directs the Secretary to consider the approval or disapproval of cooperatives as the approval or disapproval of members. This is complete authority for the action of the Secretary. He need not require further referendums by cooperatives themselves. Presumably they will vote with an eye to the best interest of their members.

The constitutionality of this provision authorizing cooperatives to vote for their members is well established. United States v. Rock Royal Cooperative, Inc., 307 U.S. 496 (1939); H. P. Hood & Sons v. United States, supra.

Plaintiffs recommend that cooperatives should not be allowed to make proposals to the Secretary for consideration in the promulgation of marketing orders. The Act does not

indicate who may submit proposals to the Secretary. Section 8c (3) provides that, whenever the Secretary "has reason to believe that the issuance of an order will tend to effectuate the declared policy of this chapter . . . he shall give due notice of and opportunity for a hearing upon a proposed order." There is no prohibition as to who may submit a proposal at this hearing.

Therefore, this Court finds that plaintiffs' attack on the rights of cooperatives to submit proposals and vote for their members is without merit. The Judicial Officer properly concluded that the plaintiffs' challenge to block voting by producer cooperatives was invalid. Judicial Officer's Decision and Order, March 9, 1977, p. 24-29.

In July of 1968, plaintiffs were determined to be handlers under Order No. 30 by the market administrator of the order, who is an agent of the Secretary. Plaintiffs contend they should not be classified as handlers because their business operations are wholly intrastate.

The United States Supreme Court addressed this issue in United States v. Wrightwood Dairy Co., 315 U.S. 110, 121 (1942) and concluded:

> . . .that the national power to regulate the price of milk moving interstate into the Chicago, Illinois, marketing area, entends to such congrol over intrastate transactions as there is necessary and appropriate to make the regulation of the interstate commerce effective; and that it includes authority to make like regulations for the marketing of intrastate milk whose sale and competition with the interstate milk affects its price structure so as in turn to affect adversely the Congressional regulation.

It is clear, then that plaintiffs can be handlers under the order even though their operations are intrastate if these operations affect interstate commerce.

Plaintiffs contend that, because they are small handlers who have as little effect upon the order as producer-handlers who are exempt from regulation,

they likewise should be made exempt. This argument is improperly made in a proceeding brought pursuant to 8c (15) of the Act. Under this section, a determination is limited to whether or not certain Department of Agriculture decisions or certain provisions of the order are in accordance with law. Questions of policy or evaluation of the effectiveness of economic and marketing regulations promulgated pursuant to the Act are not properly raised in this type of proceeding. Dairylea Cooperative, Inc. v. Butz, 504 F.2d 80 (2d Cir. 1974); United States v. Mills, supra. Such issues are more properly presented in a rule-making proceeding under 8c(3) and (4) of the Act, 7 U.S.C. 608c (3) and (4).

Therefore, this Court finds that the Judicial Officer properly upheld the market administrator's determination. The plaintiffs were handlers in that they were engaged in interstate commerce or affected interestate commerce. Judicial Officer's Decision and Order, p. 23-24.

Plaintiffs challenge the constitutionality of the producer-settlement fund, alleging that prior case law upholding this provision is no longer valid.

In United States v. Rock Royal Cooperative, Inc., supra, the Court specifically upheld the constitutionality of the producer-settlement fund provided for by Congress in 8c(5) of the Act, 7 U.S.C. 608c (5). After reviewing the plaintiffs' arguments set forth in their brief, the Court declines to overrule prior case law on the subject and concludes that 8c(5) of the Act is still constitutional. This section is not violative of the due process clause of the Fifth Amendment.

Plaintiffs also challenge the provisions of the order relating to pool plant performance requirements for supply plants and Class I pricing. Plaintiffs allege that the Class I price under Order No. 30 is too high and that pool plant qualification standards are set too low. These issues were properly raised in the petition before the Secretary.

The question is on what basis is the determination of the validity of these provisions of the order to be made. Plaintiffs' argument focuses on policy considerations about what decisions should have been made.

Plaintiffs do not allege or prove that the Secretary's decision was not in accordance with law.

Yet, in a proceeding under 8c(15) of the Act, the district court is confined to determining whether the findings and decision rendered by the Secretary are supported by substantial evidence. If they are, they may not be disturbed. Chiglades Farm Ltd. v. Butz, supra; Lewes Dairy, Inc. v. Freeman, supra. An action brought pursuant to this section is not a trial de novo, but, rather, a proceeding to review the record. United States v. Mills, supra, George Benz & Sons v. Hardin, 342 F. Supp. 88 (D. Minn. 1972).

With respect to the Class I pricing, the administrative law judge concluded that the Secretary's findings are supported by substantial evidence. After reviewing the record in this case, the Court finds that there is substantial evidence to support the Secretary's Class I price determination.

Pool plant performance requirements for supply plants are also questioned but, again, plaintiffs do not challenge the Secretary's specific findings nor the record on which the findings were based. Several hearings were held to consider this specific provision. The Secretary made reasoned findings based on the record of these hearings. After reviewing the record of these hearings, this Court concludes, as did the administrative law judge, that the Secretary's determinations relating to pool plant performance requirements are supported by substantial evidence and therefore in "accordance with law."

CONCLUSION

For the foregoing reasons, this Court finds that the Judicial Officer properly concluded that the challenged provisions of Order No. 30, the decisions of the Secretary and his agent, the market administrator, were "in accordance with law" as required by section 8c(15)(A).

Therefore, defendant's motion for summary judgment must be and is hereby GRANTED.

So ordered this 28th day of September, 1977 at Milwaukee, Wisconsin.

Robert W. Warren, U.S. Dist. Judge

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	AMA Docket No. M 30-2
	)	
Lamers Dairy, Inc., and	)	
Jerome Fischer, d/b/a	)	
Utschig Dairy,	)	
	)	
Petitioners	)	Decision and Order

This is an appeal to the Judicial Officer by petitioners from an initial decision filed under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601 et seq.), by Administrative Law Judge Dorothea A. Baker on September 27, 1976, denying the relief requested by petitioners. Judge Baker held that the challenged provisons of Federal Milk Order No. 30 regulating the handling of milk in the Chicago Regional marketing area (7 CFR Part 1030) are constitutional and are supported by substantial evidence in the relevant promulgation hearing records upon which the Secretary acted in promulgating the challenged Order provisions. Final administrative authority to decide the Department's cases subject to the Administrative Procedure Act has been delegated to the Judicial Officer (38 F.R. 10795; 42 F.R. 4395). 1/

On appeal, petitioners' primary contention is that the marketwide pool established under the Federal Milk Order is unconstitutional because it takes petitioners' property without just compensation. Petitioners further contend that the Class I price under the Order is too high, which facilitates the unconstitutional taking of petitioners' money, and the pool plant qualification standards under the Order are too low, which also facilitates the unconstitutional taking of petitioners' money. Petitioners also

1/ The office of Judicial Officer is a career position established pursuant to the Act of April 4, 1940 (7 U.S.C. 450c-450g), and Reorganization Plan No. 2 of 1953 (5 U.S.C. 1970 ed., Appendix, p. 550).

contend that the Judicial Officer erred in his ruling filed November 4, 1975, on questions certified by Judge Baker as to the admissibility of evidence. In that ruling, it was held that the validity of the Order provisions must be determined, from an evidentiary standpoint, on the basis of the promulgation hearing records upon which the Secretary issued the challenged Order provisions rather than on the basis of de novo evidence adduced at the present review proceeding.

FINDINGS OF FACT

1. Petitioner Lamers Dairy, Inc., is a Wisconsin corporation engaged principally in the business of bottling fluid milk for distribution and sale to retail customers in and around Appleton, Wisconsin, metropolitan area. Said petitioner has its place of business at 114 South John Street, Kimberly, Wisconsin 54136, and receives its raw milk supply directly from dairy farmer producers. Richard J. Lamers is the president and chief executive office of said petitioner. All of said petitioner's sales are within the State of Wisconsin.

2. Petitioner Jerome Fischer, d/b/a Utschig Dairy, is an individual engaged principally in the business of bottling fluid milk for distribution and sale to retail customers in and around the Appleton, Wisconsin, metropolitan area. Said petitioner has his place of business at 2003 North Meade Street, Appleton, Wisconsin 54911, and receives his raw milk supply directly from dairy farmer producers. All of said petitioner's sales are within the State of Wisconsin.

3. Since July 1, 1968, petitioners have been determined to be handlers under Order No. 30 by the Federal Milk Market Administrator of the Order, who is the agent for the Secretary and charged with the administration of the Order. Petitioners had been regulated handlers pursuant to the provisions of Order No. 45 (Northeast Wisconsin) prior to July 1, 1968.

4. Petitoners are in competition with cooperative associations of milk producers and other independent handlers for their supply of Grade A raw milk from

dairy farmers and in selling at retail and wholesale bottled fluid milk and milk products within the vicinity of Appleton, Wisconsin.

5. As a result of public hearings held upon a proposed Order, and on proposed amendments thereto, regulating the handling of milk in the Chicago Regional marketing area, the Secretary of Agriculture found that all milk and milk products as defined in the Order are in the current of interstate commerce or directly burden, obstruct, or affect interstate commerce in milk or its products.

CONCLUSIONS

I. Burden of Proof

This is a review proceeding instituted under 8c(15)(A) of the Act by two handlers subject to Federal Milk Order No. 30. It is well settled that the burden of proof in such proceedings rests with the petitioners. Petitioners have the burden of proving that the challenged Order provisions and the obligations imposed upon them are "not in accordance with law" (7 U.S.C. 608c (15)(A)). See Lewes Dairy, Inc. v. Freeman, 401 F.2d 308, 316-317 (C.A. 3), certorari denied, 394 U.S. 929; Boonville Farms Cooperative, Inc. v. Freeman, 358 F.2d 681, 682 (C.A. 2); United States v. Mills, 315 F.2d 828, 836, 838 (C.A. 4), certiorari denied, 374 U.S. 832, 375 U.S. 819; Windham Creamery, Inc. v. Freeman, 230 F. Supp. 632, 635-636 (D. N.J.), affirmed, 350 F.2d 978 (C.A. 3), certiorari denied, 382 U.S. 979; Bailey Farm Dairy Co. v. Jones, 61 F. Supp. 209, 217 (E.D. Mo.), affirmed, 157 F.2d 87 (C.A. 8), certiorari denied, 329 U.S. 788; Wawa Dairy Farms v. Wickard, 56 F. Supp. 67, 70 (E.D. Pa.), affirmed, 149 F.2d 860, 862-863 (C.A. 3).

The inquiry here does not encompass questions of policy, desirability, or the evaluation of the effectiveness of economic and marketing regulations issued pursuant to the Act. See In re Independent Milk Producer-Distributors' Assoc., 20 Agriculture Decisions 1, 18 (1961); In re Charles P. Mosby, Jr., d/b/a Cedar Grove Farms, 15 Agriculture Decisions 1209, 1220 (1957), affirmed,

Southern Dist. Miss., January 5, 1959. See also, Pacific States Co. v. White, 296 U.S. 176, 182.

The responsibility for selecting the means of achieving the statutory policy and the relationship between the remedy selected and such policy are peculiarly matters of administrative competence. American Power Co. v. S.E.C., 329 U.S. 90, 112; Secretary of Agriculture v. Central Roig Co., 338 U.S. 604, 610-614.

Without a showing that the action of the Secretary was arbitrary, his action is presumed to be valid. Benson v. Schofield, 236 F.2d 719, 722 (C.A. D.C.), certiorari denied, 352 U.S. 976; Reed v. Franke, 297 F.2d 17, 25-26 (C.A. 4). Mere assertions of illegality are not sufficient to have an Order provision or administrative decision declared illegal. In re College Club Dairy, Inc., 15 Agriculture Decisions 367, 373 (1956).

There is a presumption of regularity with respect to the official acts of public officers and, "in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." United States v. Chemical Foundation, 272 U.S. 1, 14-15. Accord: Reines v. Woods, 192 F.2d 83, 85 (Emerg. C.A.); National Labor Relations Board v. Bibb Mfg. Co., 188 F.2d 825, 827 (C.A. 5); Woods v. Tate, 171 F.2d 511, 513 (C.A. 5); Pasadena Research Laboratories v. United States, 169 F.2d 375, 381 (C.A. 9), certiorari denied, 335 U.S. 853, Laughlin v. Cummings, 105 F.2d 71, 73 (C.A. D.C.). Specifically, administrative Orders and regulations are presumed to be based on facts justifying the specific exercise of the delegated authority. United States v. Rock Royal Co-op., 307 U.S. 533, 566-568 (a case under the Act involved herein); Thompson v. Consolidated Gas Co., 300 U.S. 55, 69; Pacific States Co. v. White, 296 U.S. 179, 185-186.

II. The Establishment of a Market-Wide Pool, with a "Producer-Settlement Fund," in the Order is Constitutional

Fifty-two of the 56 Federal Milk Orders in effect on January 1, 1976, provide for a market-wide pool, with a Producer-Settlement Fund, under which all producers

delivering milk to all handlers receive uniform prices for their milk. 2/ Four of the 56 Orders provide for an individual handler pool, under which all producers delivering milk to the same handler receive uniform prices for their milk. The Act expressly authorizes market-wide pools (7 U.S.C. 608c (5) (A) (ii); 7 U.S.C. 608c (5) (C)), and individual handler pools (7 U.S.C. 608c (5) (B) (i)). The procedure under a market-wide pool is generally as follows (Grant v. Benson, 229 F.2d 765, 767 (C.A. D.C.), certiorari denied, 350 U.S. 1015):

> The Market Administrator computes the value of milk used by each pool handler by multiplying the quantity of milk he uses in each class by the class price and adding the results. The values for all handlers are then combined into one total. That amount is decreased or increased by several subtractions or additions. * * * The result is divided by the total quantity of milk that is priced under the regulatory program. The figure thus obtained is the basic or uniform price which must be paid to producers for their milk. Each handler whose own total use value of milk for a particular delivery period, i.e., a calendar month, is greater than his total payments at the uniform price is required to pay the difference into an equalization or producer-settlement fund. Each handler whose own total use value of milk is less than his total payments to producers at the uniform price is entitled to withdraw the amount of the difference from the equalization or producer-settlement fund. Thus a composit or uniform price is effectuated by means of the equalization or producer-settlement fund.

2/ Summary of Major Provisions in Federal Milk Marketing Orders, January 1, 1976 (Dairy Division, AMS, USDA), Table 12, pp. 46-47.

The constitutionality of a market-wide pool was settled in United States v. Rock Royal Co-op., 307 U.S. 533, 571-573, 3/ which held:

> B. Equalization Pool. -- In order to equalize the prices received by producers, handlers are required to clear their purchases through the producer settlement fund. Payments into and withdrawals from this fund depend upon the "value" of the milk received which is fixed by the Order at different prices governed by the use made by the handler of the purchased milk and upon whether his obligations to producers are greater or less than the uniform price due the producers under the scheme. The result of the use of the device of an equalization pool is that each producer, dealing with a proprietary handler, gets a uniform or weighted average price for his milk, with differentials for quality, location or other usual market variations, irrespective of the manner of its use. The Act, 8c (5) (B) (ii) and (C) and the Order, Articles IV, VI and VII, authorize such an adjustment.
>
> The defendants' objection to the equalization pool * * * is to the alleged deprivation of liberty and property accomplished by the pooling requirement in taking away from the defendants their right to acquire milk from their patrons at the minimum class price, according to its use, and forcing the handlers to pay their surplus, over the uniform price, to the equalization pool instead of to their patrons. This argument assumes the validity

3/ Accord: H.P. Hood & Sons v. United States, 307 U.S. 588, 595; Crull v. Wickard, 137 F.2d 406, 409 (C.A. 6); United States v. Mills, 315 F.2d 828, 838 (C. A. 4), certiorari denied, 374 U.S. 832, 375 U.S. 819.

of price regulation, as such, but denies the constitutionality of the pooling arrangement because handlers are not at liberty to pay the producer in accordance with the use of the producer's milk but must distribute the surplus to others whose milk was resold less advantageously. It is urged that to carry this principle of contribution to its logical conclusion would mean that the wages of the employed should be shared with the unemployed; the highly paid, with the underpaid; and the receipts of the able, the fortunate and the diligent, with the incompetent, the unlucky and the drone.

No such exaggerated equalization of wealth and opportunity is proposed. The pool is only a device reasonably adapted to allow regulation of the interstate market upon terms which minimize the results of the restrictions. It is ancillary to the price regulation designed, as is the price provision, to foster, protect and encourage interstate commerce by smoothing out the difficulties of the surplus and cut-throat competition which burdened this marketing. In Mulford v. Smith, we made it clear that volume of commodity movement might be controlled or discouraged. As the Congress would have, clearly, the right to permit only limited amounts of milk to move in interstate commerce, we are of the opinion it might permit the movement on terms of pool settlement here provided.

Common funds for equalizing risks are not unknown and have not been considered violative of due process. The pooling principle was upheld in workmen's compensation, bank deposit insurance, and distribution of benefits in the Transportation Act.

The defendants rely particularly upon

Thompson v. Consolidated Gas Utilities Corp., and Railroad Retirement Board v. Alton R. Co. In the Thompson case, the Texas Railroad Commission ordered proration of gas production in the Panhandle. It was assumed that proration to prevent waste and protect correlative rights in a pool was valid but it was held that the proration order in issue was for none of these purposes. It was for the "sole purpose . . . to compel those [with market outlets] . . . to purchase gas from potential producers" who have no market. This was not deemed to be reasonably related to the conservation of gas or the protection of correlative rights. In the Retirement Board case, the pooling principle was involved but was found to be invalid because the burdens on the roads were not equalized with the benefits. Entry on service was made at different age levels for different roads. Employees seventy or older were required to retire. Some roads had none. Solvent and insolvent roads were liable alike. All carriers were treated as a single employer. It was these provisions, deemed unequal, which led to the conclusion that the manner of pooling of funds denied due process. In this case, the pooling has differentials to cover the variations of quality and location. [Footnotes omitted; emphasis supplied.]

Petitioners contend that the economic conditions relating to milk production and marketing are not the same as they were in 1939 when the Rock Royal case sustained the constitutionality of market-wide pooling under the Act. However, petitioners cite no evidence in support of their argument from the promulgation hearing records upon which the Order and its amendments are based. As shown below, the validity of the Order must be tested, from an evidentiary standpoint, solely on the basis of the evidence adduced at the promulgation hearings.

Moreover, petitioners' complaint in this respect is

that under today's marketing conditions, the Order results in inequities between handlers. But it is settled that the fact that a particular regulation "may demonstrably be disadvantageous to certain areas or persons" is not enough to constitute a violation of the due process clause. Secretary of Agriculture v. Central Roig Refining Co., 338 U.S. 605, 617-619. See, also, American Trucking Ass'ns v. United States, 344 U.S. 298, 322, fn. 20; Bowles v. Willingham, 321 U.S. 503, 518; Wickard v. Filburn, 317 U.S. 111, 129-131; Hegeman Farms Coop. v. Baldwin, 293 U.S. 163, 170-173; Lewes Dairy, Inc. v. Freeman, 401 F.2d 308, 311-312, 319-320 (C.A. 3), certiorari denied, 394 U.S. 929; United States v. Mills, 315 F.2d 828, 838 (C.A. 4), certiorari denied, 374 U.S. 832, 375 U.S. 819; Wawa Dairy Farms, Inc. v. Wickard, 149 F.2d 860, 863-864 (C.A. 3).

III. The Validity of the Challenged Order Provisions Must Be Tested, from An Evidentiary Standpoint, Solely on the Basis of the Evidence Adduced at the Promulgation Hearings. Co-operatives Properly Play a Leading Role in, and Properly Derive Benefits from, the Marketing Order Program.

Petitioners contend that under today's marketing conditions, the market-wide pool results in taking petitioners' property without just compensation. Petitioners contend particularly that the Class I price under the Order is too high and that the pool plant qualification standards under the Order are too low, which facilitates the taking of petitioners' money. Petitioners further contend that the cooperatives exercise the real control and authority over Federal Milk Order No. 30, rather than the Secretary, and that the Order gives competing cooperatives an economic advantage over petitioners. Specifically, petitioners allege in their Amended Petition, pp. 2-7, the following facts:

> (d) Under said orders, the minimum prices for raw milk are generally established according to a dual pricing system; raw milk which is used

> in manufacturing milk products (called "Class II milk" under the orders) is priced at a certain price per hundredweight ("cwt.") and raw milk processed and bottled as fluid milk (called "Class I milk") is priced at a higher price than Class II milk, which price is composed of the Class II price plus an established differential.
>
> (e) By virtue of the Act and the general regulations for milk marketing orders issued by the Secretary (7 CFR, Part 900), any proposed original order and any proposed order as amended, before becoming effective, must be approved by vote of at least two-thirds (2/3) of the dairy farmer producers whose raw milk is to be regulated by said order, or order as amended. In the event that said approval is not received, the Secretary may not generally issue the order and regulate the raw milk which would be affected.
>
> (f) The aforesaid general regulations provide that milk marketing cooperatives may vote on proposed orders and orders as amended on behalf of the dairy farmer producers who are members of such cooperatives.
>
> * * * *
>
> (i) A small number of cooperatives, all members of the same common marketing agency, Central Milk Sales Agency, ("CMSA") control well in excess of two-thirds of the votes on Order No. 30 because of their dairy farmer producer membership. The identity of said cooperative members of CMSA is as follows * * *:
>
> Associated Milk Producers, Inc. ("AMPI")
>
> * * * *
>
> On information and belief, AMPI alone controls

in excess of two-thirds of the producer votes on Order No. 30 through its right to vote on behalf of its member-producers supplying the Chicago Regional Marketing Area, pursuant to the terms of 7 U.S.C. 601 and following.

(j) On information and belief, the above-listed CMSA cooperatives, acting principally through CMSA, propose and have proposed amendments and other changes to Order No. 30 on a regular basis, which amendments and other changes are, as a matter of course, adopted by the Secretary or his agents and then approved by these cooperatives voting on behalf of their member producers.

(k) These same CMSA cooperatives operate numerous milk manufacturing and fluid milk processing plants throughout the state of Wisconsin, which plants are qualified as supply plants and distributing plants respectively on Order No. 30. * * * The CMSA cooperatives compete with petitioners in obtaining an adequate Grade A raw milk supply from producers and in selling at retail and wholesale, bottled fluid milk and milk products within, and within the vicinity of, the Appleton, Wisconsin metropolitan area. * * *

(l) The CMSA cooperatives have proposed and approved many amendments and changes to Order No. 30 which are favorable to themselves and injurious to petitioners in competition with them for an adequate Grade A raw milk supply and for wholesale and retail sales of bottled fluid milk and milk products in, and in the vicinity of the Appleton, Wisconsin metropolitan area, which amendments and changes are as follows:

(1) Amendments and changes to Order No. 30 which, since 1968, have continuously provided for unreasonably high Class I differentials and which have substantially exceeded the extra costs of supplying Class I milk to the Chicago Regional Marketing Area.

(2) Amendments and changes to Order No. 30 providing for unreasonably low supply plant and unit pooling plant qualification standards under Section 1030.7 and its predecessors, which unreasonably low qualification standards frustrate the main objectives of the Act, to aid in bringing about orderly marketing in place of the chaotic conditions which existed prior to regulations, and to insure consumers an adequate supply of high-quality milk.

The effect of the aforesaid amendments and changes is to force petitioners and other small handlers with consistently high Class I utilization requirements to subsidize in substantial part the businesses of their CMSA cooperative competitors, hindering petitioners in their ability to compete with CMSA cooperatives in obtaining an adequate Grade A raw milk supply and in selling at retail and wholesale bottled fluid milk and milk products; while at the same time, enhancing the ability of said CMSA cooperatives to compete with petitioners in said activities in the area set forth in subparagraph (k) and this subparagraph (l) above.

Based on the foregoing alleged facts, petitioners contend they should be exempt from the Order on the following grounds:

(1) The possession and exercise of control and authority over Order No. 30 by certain cooperatives constitutes unlawful delegation of power by the Secretary and his agents to private groups and corporations, which delegation of power is arbitrary, capricious, unreasonable, and an abuse of administrative discretion, and which violates Article I of the Constitution of the United States of America as unlawful delegation of legislative power.

(2) By reason of the fact that Petitoners are required by Order No. 30 to pay into the Producer Settlement Fund and other funds established under the Order, substantial amounts of money which Petitioners have earned in their businesses, such requirement violates the Fifth Amendment of the Constitution of the United States of America in that it takes Petitioners' private property for a public use without just compensation.

(3) By reason of the facts alleged in the Petition the possession and exercise of control and authority over Order No. 30 violates Section 1 of the Fourteenth Amendment to the Constitution of the United States of America in that it constitutes unlawful class legislation and deprives Petitioners of the equal protection of the laws of the United States.

(4) The determination by the Secretary and the Federal Milk Market Administrator of Order No. 30 that Petitioners are handlers, violates the provisions of 7 U.S.C. 608(c)(1) and is an unlawful determination, and is arbitrary, capricious, unreasonable, and an abuse of administrative discretion.

(5) The fluid milk and milk products marketed by Petitioners are not in interstate commerce and do not exert a substantial economic effort on interstate commerce. Accordingly, the Petitioners allege that the purported regulation of the Petitioners as handlers under Order No. 30 violates Article I, Section 8, of the Constitution of the United States of America in that it exceeds the commerce power of the Congress of the United States as said regulation affects Petitioners.

An oral hearing was conducted in this 8c (15)(A) review proceeding on September 4, 1975. At that hearing, petitioners' documentary and testimonial evidence was made an offer of proof (Tr. 12). The respondent was permitted to have a "continuing objection to all of the evidence" offered by petitioner (Tr. 43). In addition, respondent made other objections to the offer of proof and motions to strike (Tr. 43, 65, 67, 74, 90, 104, 110, 114a, 116, 117, 123).

After the oral hearing was recessed, Judge Baker certified to the Judicial Officer the question as to the admissibility of the evidence offered by petitioners. The Judicial Officer ruled that the general testimony by the two petitioners relating to their businesses (Tr. 110, line 20 through Tr. 112, line 24; tR. 114a, line 23 through Tr. 116, line 13; Tr. 116, lines 19-20) is admissible; and that all of the other testimony is inadmissible in this review proceeding. Petitioners contend that that ruling was erroneous.

The evidence proffered by prtitioners relates to the wisdom or efficacy of the Federal Order provisions. It consists of testimony indicating that the cooperatives persuaded the Secretary to set the Class I price for milk too high, thereby putting the petitioners at a competitive disadvantage compared to the cooperatives. The proffered evidence indicates that because the Class I price is too high, and the pool plant qualification standards are too low, the Order does not tend to effectuate the declared purposes of the Act. Petitioners' evidence would show that a sufficient supply of pure and wholesome milk would be produced at a lower Class I price, and that consumers would be better able to purchase fluid milk at a lower price.

For example, Dr. Roland W. Bartlett, the petitioners' principal witness, testified (Tr. 47-51, 59-60, 80-81):

> [Tr. 47] A. Okay, okay. Quickly, I would refer to the disorderly marketing factors of federal milk orders in three or four statements. First, they permitted co-operatives to use federal milk orders as a foundation for exacting overorder Class I payments over federal order Class I prices. Co-operatives have used threats, intimidation, and coercion over little co-operatives and little handlers in carrying out this.
>
> Secondly, they permitted the use of pool plant provisions that resulted in milk supplies far in excess of the volume needed for an adequate supply as authorized by the Act. They have permitted excessive price of Grade A milk in federal orders. And this constitutes a national scandal by exacting -- by -- but permitted a volume of Grade A milk to be freed from competition.
>
> And the third point I make in regard to overall, they exacted federal order Class I prices far in excess of Minnesota-Wisconsin manufacturing price being necessary to get an adequate supply of milk in accordance with the Act.
>
> Combination of overorder payments of cooperatives and the excessive federal order Class I prices together have [Tr. 48] cost consumers probably at least two cents a -- resulted in consumers paying at least two cents a quart in the Chicago area and throughout the United States, more than is necessary to get an adequate supply of milk. * * *
>
> * * * *
>
> [Tr. 50] Q. Doctor, getting back to the Class I differential that is not considering the overorder premiums that the co-operatives

> are exacting, but strictly with respect to the Class I differential and strictly with respect to Order No. 30, is it your conclusion or your opinion that the Class I differential is excessive on Order No. 30?
>
> A. Yes.
>
> Q. And what do you base that opinion on, Doctor?
>
> [Tr. 51] A. It's based upon my studies of the amount that the Class I price necessary over the Minnesota-Wisconsin price to get an adequate supply of milk in conformance with the Act.
>
> Q. And, Doctor, when was this study performed?
>
> A. This study was presented in 1974, and included the data for 1972.
>
> Q. And did it include the data specifically for the Chicago Order No. 30?
>
> A. Yes. On page six, in the markets with overorder payments, Chicago is one of the fifteen markets with overorder payments in 1972. And it included the -- it included Chicago as one of the 25.
>
> Q. I see. Now, just to make certain that the record is clear on this point, could you explain what you mean by overorder payments?
>
> A. Yes. Overorder payments are payments exacted by co-operatives with the foundation of a federal order Class I price in excess of the federal order Class I price.
>
> Q. I see.
>
> A. And they've used threats, intimidation, and coercion in effectuating these overorder payments. And this has been permitted by the Department of Agriculture even though, according

to the Act, the Secretary of Agriculture is supposed to protect consumers.

* * * *

[Tr. 59] A. * * * Seventy-seven percent of the total net receipts in the United States are Grade A. Currently. Or 1973. Class I sales amount to 49%. There's been an increase in the proportion of the total milk supplies going to Grade A because of this excessive Class I price. Federal milk orders have been -- effectuated disorderly marketing by taking into the federal order excessive supplies of Grade A manufacturing milk have been the reason why we have this big increase in unnecessary surplus. * * *

Q. Yes. My question was, Doctor, -- and to restate it again was, does some of the profit of the manufacturing end [Tr. 60] come out of the pooling system?

A. Yes. It comes out of the pooling system because the only reason that a manufacturing plant wants to get under the federal order is to get money from the pool. And by the federal order including all of this excess milk in the pool, the small dealer is helping to pay for the market blend. And he is penalized because of this. He has no -- the manufacturing plant has income from its operations, which the small dealer doesn't. And this creates an unfair competitive advantage against the little dealer.

Q. And, Doctor, this occurs on Order No. 30 as well as other orders?

A. That's true.

Q. Okay, Now, Doctor, is there any effect upon the consumer because of the excess supplies of milk on Federal Order 30 as well as other orders, and because of the excessive

Class I differential?

A. Yes. * * *

* * * *

[Tr. 80] A. The principal methods used by the Associated Milk Producers, Incorporated, to bring about monopoly Class I [Tr. 81] prices for milk are, first, creating a standby pool. Second, using the bargaining power of large regional co-operatives, including the federal order, the co-operatives in AMPI, in the Chicago area, to get excessive federal order Class I prices, loading the pool, taking away needed milk supplies from handlers and making threats to do so. Buying out aggressive dealers and underpricing in order to get competitors' accounts. Providing a dairy with free rent. Paying off a co-operative manager. And among these eight, I would like very particularly to refer to one, two, four, and eight, which deal with the Chicago area more particularly.

The petitioners have misconceived the basic nature of a review proceeding under 8c (15)(A) of the Agricultural Marketing Agreement Act of 1937 (7 U.S. C. 608c (15) (A)). An action brought pursuant to 8c (15)(A) of the Act is not a trial de novo but rather is a proceeding to review the record, on which the challenged administrative decision is based, to determine whether the administrative decision is based on substantial record evidence. Wawa Dairy Farms v. Wickard, 56 F. Supp. 67, 70 (E. D. Pa.), affirmed, 149 F.2d 860, 862 (C.A. 3); Windham Creamery, Inc. v. Freeman, 230 F. Supp. 632, 633 (D. N.J.), affirmed, 350 F.2d 978 (C.A. 3), certiorari denied, 382 U.S. 979. See, also, In re College Club Dairy, Inc., et al., 15 Agriculture Decisions 367, 371 (1956).

The petitioners have the right to contend in this proceeding that the Class I price under Federal Order

No. 30 is too high and that the pool plant qualification standards are too low. But the question is, upon what record is the determination as to the validity of such Order provisions to be made?

It has been settled for more than 30 years that evidence such as that proffered by petitioners in this case is not admissible in a review proceeding under 8c (15) (A) of the Act. In In re Andrew W. Leonberg, 32 Agr Dec 763, 792-793 (1973), appeal pending, it is stated:

> It is well established that when the lawfulness of the Order itself or a provision thereof is attacked, the Act affords no trial de novo by way of the 8c(15)(A) petition. The Order must stand or fall upon the basis of the evidence before the Secretary adduced during the promulgation proceedings, and additional evidence is not relevant or admissible in the 8c(15)(A) proceeding. "To allow evidence [in the 8c(15)(A) proceeding not presented in the promulgation proceeding] would be to reopen, rather than to judge, the promulgation proceeding." United States v. Mills, 315 F.2d 829, 836 (C.A. 4), certiorari denied, 374 U.S. 832. Accord: Dairymen's League Cooperative Ass'n v. Brannan, 173 F.2d 57, 66 (C.A. 2), certiorari denied, 338 U.S. 825; In re Terrace Park Dairy, 12 Agriculture Decisions 1383, 1396-1397 (1953); Sprague Dairy Co. v. Anderson, 6 Agriculture Decisions 729 (N.D. Ill.). See, also, Acme Fast Freight, Inc. v. United States, 154 F. Supp. 239, 241 (S.D. N.Y).
>
> This exclusionary rule is necessary to maintain the integrity of the regulatory program. The promulgation of an Order or an amendment thereto is formal rulemaking subject to section 7 of the Administrative Procedure Act (5 U.S.C. 556), which provides that no rule shall be issued except as "supported by and in accordance with the reliable, probative, and substantial evidence." Section 8c(4) of the Agricultural Marketing Agreement Act (7 U.S.C. 608c (4)) requires that in issuing an Order the Secretary shall find upon the evidence introduced at the promulgation hearing that issuance of the Order will tend to effectuate the declared policy of the Act. The administrative process would be seriously disrupted if the Secretary based his determination to issue an Order upon the evidence before him, while the validity of his determination was later judged upon different evidence. Therefore, any new, relevant evidence bearing upon the validity of the Order must be presented first to the Secretary in his legislative, and not in his judicial capacity. 4/

Similarly, in In re Cloverleaf Dairy Co., 4 Agriculture Decisions 627, 632-633 (1945), affirmed sub nom. Sprague Dairy Company v. Anderson, 6 Agriculture Decisions 729 (N.D. Ill.), the Judicial Officer stated:

> Petitioners do not claim that Order No. 69 as a whole is invalid. They ask that the order be modified to exclude certain territory in Will County from the marketing area defined or that petitioners be exempted from the operation of the order, because (1) the handling of milk by petitioners is not in the current of interstate commerce and does not directly burden, obstruct or affect interstate commerce in milk or milk products, and (2) there is no need to include Will County under the order and such inclusion is arbitrary because there were no disorderly marketing conditions, because petitoners had satisfactory relationships with

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4/ Some of the petitioners' evidence would have been irrelevant even in a rulemaking proceeding, e.g., evidence relating to other marketing area.

producers, and because the markets in Will County, such as Joliet, are purely local markets separated from Chicago by miles of rural territory.

Petitioners insist that they are entitled under the act to a de novo hearing on their petition, that is, that they are entitled, apart from the promulgation hearings, to introduce and to have considered evidence on the allegations in their petition.

The issuance of Order No. 69 was quasi-legislative in character. Section 8c of the act requires notice, hearing and a finding, that the order and all its terms and provisions will tend to effectuate the declared policy of the act. This proceeding is one for review and is of a quasi-judicial nature. Certainly, then, petitioners' complaints that the inclusion of Will County is arbitrary, contrary to the facts, will not effectuate the policy of the act, etc., must be evaluated in the light of the record upon which the order was promulgated, rather than by means of other and different evidence produced at a hearing in this proceeding. I think the same conclusion ought to apply to petitioners' contentions that the handling of milk in Will County is not in the current of interstate commerce and does not directly burden, obstruct, or affect interstate commerce in milk or milk products. The answer on this point is not entirely free from doubt but, in addition to the notice, hearings and finding referred to above, the order was accompanied by a finding (sec. 969.0(a)(4)) that the handling of all milk in the marketing area defined "is in the current of interstate commerce, or directly burdens, obstructs, or affects interstate commerce in milk and its products." I think, then, that the allegations as to absence of any

interstate commerce grounds for including Will County in the marketing area must also be considered upon the basis of the evidence adduced at the promulgation hearings.

These conclusions denying petitioners de novo hearing do not, as petitioners seem to believe, deprive them of a hearing. The decision is that the scope of the hearing is restricted to examination and consideration of the evidence in the promulgation record.

The Court, in affirming the Judicial Officer's decision in the Cloverleaf Dairy Co. case, just quoted, stated (Sprague Dairy Company v. Anderson, 6 Agriculture Decisions 729 (N.D. Ill.):

> The validity of a marketing order issued pursuant to the Agricultural Marketing Agreement Act of 1937 must be adjudged on the basis of the promulgation hearing record which precedes the issuance of such an order and upon which such an order must be predicated.

It has consistently been held that evidence which goes to the soundness of the Secretary's decision as to an Order, to whether an Order should be amended, to the practicality, effectiveness or desirability of an Order, or to whether the Order effectuates the declared policy of the Act, is properly presented to the Secretary only in his quasi-legislative capacity, that is, in a quasi-legislative hearing being held pursuant to 8c(3) and (4) of the Act, and may not properly be presented to the Secretary in his quasi-judicial capacity in a Section 8c(15)(A) review proceeding. See In re William S. Wright, 2 Agriculture Decisions 327; 2 Agriculture Decisions 383, 384-385 (1943); In re Abbots Dairy, 2 Agriculture Decsions 553, 555-556 (1943); In re Brucer Dairy, 2 Agriculture Decisions 661, 662 (1943); 3 Agriculture Decisions 247, 249-250 (1944); In re Roberts Dairy Company, 4 Agriculture Decisions 84,

89 (1945); In re Cloverleaf Dairy Co., et al., 4 Agriculture Decisions 627, 632-633 (1945), affirmed sub nom. Sprague Dairy Company v. Anderson, 6 Agriculture Decisions 729 (N.D. Ill.); In re Edward J. Vagim, 17 Agriculture Decisions 167, 168-169 (1958); In re Cedar Grove Farms, 21 Agriculture Decisions 983, 985 (1962); In re Colonel Norman J. Riebe, 22 Agriculture Decisions 350, 351 (1963); In re Producers Creamery Company of Springfield, 23 Agriculture Decisions 515, 516 (1964); In re Arvin Rawlings and Blair Greaves, 28 Agriculture Decisions 1222, 1223 (1969); In re Diamond State Dairies, Inc., 25 Agriculture Decisions 1189, 1192 (1966); In re Tuscan Dairy Farms Inc., et al., 30 Agriculture Decisions 1135, 1148 (1971), affirmed, Tuscan Farms v. Hardin, 31 Agriculture Decisions 1126, 1127-1130 (D. N.J. 1972); In re Hawthorn-Melody, Inc., 30 Agriculture Decisions 1774, 1791 (1971); In re Fitchett Bros., Inc., 33 Agriculture Decisions 257, 265 (1974); In re Michaels Dairies, Inc., 33 Agriculture Decisions 1663, 1701,1727 (1974), affirmed, ___ F.2d ___ (No. 75-2023, C.A. D.C., decided December 17, 1976). 5/

For the foregoing reasons, the evidence proffered at the September 4, 1975, hearing, except as indicated above, was properly ruled inadmissible. 6/

Since petitioners do not contend that substantial evidence in the rulemaking hearings does not support the Secretary's findings relating to the market-wide pool, the Class I price and the pool plant qualification stan-

5/ There is no basis for petitioners' contentions (Appeal, p. 4) that the evidence admitted in promulgation hearings is narrow in scope and that evidence cannot be adduced in support of the legal questions involved in Orders to be promulgated. See 7 CFR 900.8.

6/ Numerous issues may be raised in 8c(15)(A) review proceedings which would permit the introduction of de novo evidence, e.g., as to whether a milk bottler's activities meet the criteria of a producer-handler, exempt from certain portions of the regulatory program. See, e.g., In re John Bertovich, 35 Agr Dec __(decided Feb. 16, 1977).

dards, I have not read such evidence. However, Judge Baker, who did read the rulemaking evidence, concluded that the Secretary's findings are supported by substantial evidence.

The foregoing principles apply to the evidence with respect to the interstate commerce issue, as well as to the other issues. The petitioners contend that they are not handlers because their activities allegedly are not in the current of interstate or foreign commerce and do not directly burden, obstruct, or affect interstate or foreign commerce (see 7 U.S.C. 608c(1)).

However, the commerce issue was developed at the quasi-legislative promulgation hearings, and the Secretary made detailed findings of fact based on such evidence (33 F.R. 7516-7517). Hence the commerce issue, as well as the other issues, must be determined on the basis of the promulgation hearing records. Here, again, petitioners do not contend that the Secretary's "commerce" findings are not supported by substantial evidence in the rulemaking records, and therefore, I have not read such evidence.

At one time, a distinction was made in certain types of proceedings between "jurisdictional facts" and other facts (see, e.g., Crowell v. Benson,285 U.S. 22, 54-65), but that "doctrine probably is no longer law". Davis, Administrative Law Treatise (1958), Vol. 4, Sec. 29.08, p. 156. See, also, Davis, Administrative Law Treatise (1970 Supp.), Sec. 29.08.

It is, of course, well settled that the regulation of intrastate commerce in milk which affects interstate commerce is constitutional. United States v. Wrightwood Dairy Co., 315 U.S. 110, 118-121, United States v. Rock Royal Co-op., 307 U.S. 533, 568-571; H. P. Hood & Sons, Inc. v. United States, 307 U.S. 588.

With respect to the six exhibits offered at the September 4, 1975, hearing, Exhibits 1-3 relate to subpoenas duces tecum addressed to two Cooperative officers to produce records relating to block voting of member cooperatives and to the number of producer-members of Associated Milk Producers, Inc. The subpoenas duces tecum have now been superseded by applications for new

subpoenas duces tecum and, therefore, Exhibits 1-3 are irrelevant.

Exhibits 4-6 relate to economic facts bearing on the wisdom or efficacy of the challenged Order provisions; and are inadmissible for the reasons set forth above.

Petitioners' application for subpoenas duces tecum to be issued to the two Cooperative officers referred to above, and for a subpoena to be issued to Mr. John Kornely, Manager, Kornely Dairy, was properly denied. With respect to the application for a subpoena addressed to Mr. John Kornely, the petitioners state (Application for Subpoena Duces Tecum p. 4):

> 11. The applicants further request that a subpoena be issued to John Kornely, Manager of Kornely Dairy, Two Rivers, Wisconsin, whom the applicants believe to have information relevant to this case but who refuses to appear without subpoena. Mr. Kornely's testimony would support applicants' allegations to the effect that the Class I differential is too high and the pool plant qualification standards are excessively low.

Such testimony would relate to the wisdom or efficacy of the Order provisions and, as stated above, would be admissible in a promulgation hearing, but not in an 8c(15)(A) review proceeding.

The subpoenas duces tecum addressed to the Cooperative officers are for the purpose of proving that the cooperatives have sufficient membership to control the producer referenda relating to the Order and that they exercise that power by block voting.

There is no basis for issuing a subpoena duces tecum to enable petitioners to prove that the cooperatives have sufficient membership to control the producer referenda relating to the Order, inter alia, because it is admitted in the Answer, paragraph 10, that the cooperatives control over 75% of the producers supplying the Chicago Regional marketing area. Respondent does not, and cannot, dispute the fact that the cooperatives have the power to control the producer referenda under the Order.

There is no basis for issuing a subpoena duces tecum to enable petitioners to prove the cooperatives' voting practices since, inter alia, the Department's regulations protect the sanctity of the ballot in producer referenda. Specifically, the regulations provide (7 CFR 900.309):

> 900.309 Confidential information.
>
> The ballots cast, the identity of any person who voted, or the manner in which any person voted and all information furnished to, compiled by, or in the possession of the referendum agent, shall be regarded as confidential.

The details of a producer referendum and the manner in which it is conducted are not reviewable. Freeman v. Hygeia Dairy Company, 326 F.2d 271, 273 (C.A. 5). Hence the petitioners are not permitted in this proceeding to violate the sanctity of the ballots cast in producer referenda by subpoenas duces tecum.

Moreover, the Supreme Court has expressly approved block voting by dairy cooperatives under the Act even if the effect of the Order gives the cooperatives a monopoly of the market. Specifically, the Court held in United States v. Rock Royal Co-op., 307 U.S. 533, 559-560: 7/

> It is quite true that the League [i.e., a cooperative] which itself cast two-thirds of the favorable votes was in a position to cast more than one-third of the total qualified vote against the Order. This arises from the provision of the Act [7 U.S.C. 608c(12)], authorizing coopertives to express the approval or disapproval for all of their members or patrons. This is not

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7/ See, also, H. P. Hood & Sons v. United States, 307 U.S. 588, 599.

> an unreasonable provision, as the cooperative is the marketing agency of those for whom it votes. If the power is in the Congress to put the order in effect, the manner of the demonstration of further approval is likewise under its control. These associations of producers of milk have a vital interest in the establishment of an efficient marketing system. This adequately explains their interest in securing the adoption of an order believe by them to be favorable for this purpose. If ulterior motives of corporate aggrandizement stimulated their activities, their efforts were not thereby rendered unlawful. If the Act and Order are otherwise valid, the fact that their effect would be to give cooperatives a monopoly of the market would not violate the Sherman Act or justify the refusal of the unjunction. [Footnotes omitted: emphasis supplied.]

The programs for the regulation of milk marketing under the Act are largely an extension and continuation of the work of cooperative marketing associations prior to this legislation. 8/ It was recognized early in the administration of the Act that without a strong cooperative in a milk market "the cornerstone for a successful program is lacking." Report of the Associate Administrator of the Agricultural Adjustment Administration, in Charge of the Division of Marketing and Marketing Agreements, and the President of the Federal Surplus Commodities Corporation (1939), p. 31. "It

8/ See, Economic Standards of Government Price Control, Monograph No. 32 (76th Cong., 3rd Sess., Senate Committee Print for the Use of the Temporary National Economic Committee in the Investigation of Concentration of Economic Power), pp. 58-59; Black, The Dairy Industry and the AAA (The Brookings Institution, 1935), pp. 192-196; Bartlett, Cooperation in Marketing Dairy Products, pp. 188-210; Agricultural Cooperation in the United States (Farm Credit Administration, April 1947), p. 45 et seq.

would be impossible to have the type of regulatory program which exists today without strong co-operative organizations." Id. at p. 30. See, also, Black, The Dairy Industry and the AAA (The Brookings Institution, 1935); pp. 467-468; Nourse, Davis, and Black, Three Years of the Agricultural Adjustment Administration (The Brookings Institution, 1937), pp. 267-268.

The distinction under the Act between cooperatives and other handlers, and the encouragement to be given cooperatives under Federal Milk Orders, was recognized in United States v. Rock Royal Co-op., supra, 307 U.S. 533, 562-564 as follows:

> Different treatment has been accorded marketing cooperatives by state and federal legislation alike. Indeed the Secretary is charged by this Act to "accord such recognition and encouragement to producer-owned and producer-controlled cooperative associations as will be in harmony with the policy toward cooperative associations set forth in existing Acts of Congress, 9/ and as will tend to promote efficient methods of marketing

9/ Numerous acts of Congress deal with cooperatives differently from proprietary business enterprises, and enunciate the policy of aiding and encouraging the establishment, operation, and growth of marketing cooperatives. Some of the instances of the Congressional policy of special consideration for and treatment of, cooperatives are in the Agricultural Marketing Act of June 15, 1929 (12 U.S.C. 1141, 1141j); the Clayton Act (15 U.S.C. 17); the Capper-Volstead Act (7 U.S.C. 291); the Robinson-Patman Act of June 19, 1936 (15 U.S.C. 13b); the Commodity Exchange Act (7 U.S.C. 10a); and the Agricultural Fair Practices Act of 1967 (7 U.S.C. 2301 et seq.). See also, Nourse, The Legal Status of Agricultural Cooperation, pp. 241-266; and Hulbert, Legal Phases of Cooperative Assiciations (Farm Credit Administration, May 1942), pp. 307-322.

and distribution." [7 U.S.C. 610(b)(1)]. These agricultural cooperatives are the means by which farmers and stockmen enter into the processing and distribution of their crops and livestock. The distinctions between such cooperatives and business organizations have repeatedly been held to justify different treatment.

* * * *

The producer cooperative seeks to return to its members the largest possible portion of the dollar necessarily spent by the consumer for the product with deductions only for modest distribution costs, without profit to the membership cooperative and with limited profit to the stock cooperative. It is organized by producers for their mutual benefit. For that reason, it may be assumed that it will seek to distribute the largest amounts to its patrons. [Footnotes omitted.]

Similarly, the favored position of producers under the Act (which includes, of course, cooperatives) was expressed in In re Michaels Dairies, Inc., 33 Agr Dec 1663, 1709 (1974), affirmed sub nom. Michaels Dairies v. Butz, 34 Agr Dec 1319, 1320, 1323 (D.C.D.C.), affirmed, ____ F.2d ____ (No. 75-2023, C.A. D.C., decided December 17, 1976) as follows:

Where there is a clash of interests between the handlers on the one side and the producers and consumers on the other, the statute provides a clear-cut basis for resolving the clash. Orders issued under Act are "principally for the economic protection of producer and consumer" (United States v. Mills, 315 F.2d 829, 837 (C.A. 4), certiorari denied, 374 U.S. 832, 375 U.S. 819). The Act provides for the issuance of marketing Orders with or without handler approval (7 U.S.C. 608c(8) and (9)). In practice, almost no handler ever agrees

to sign a milk marketing agreement, and all of the approximately 60 milk Orders were promulgated after the handlers refused to agree to the programs. It is not unusual for handlers such as petitioner to be unhappy with a program designed to regulate them for the benefit of producers and consumers.

In short, petitioners' attack on block voting by the producer cooperatives, and the benefits the cooperatives obtain under the Order, misconceives the proper role of cooperatives under the regulatory program, and ignores the significant purpose of the Act to aid cooperatives and other producers.

For the first time in their Appeal, p. 8, petitioners complain that the Secretary refused to schedule promulgation hearings in 1973 and 1976 to consider whether an individual handler pool should be established. Since this issue was not raised below, it cannot be raised on appeal. However, even if the issue could be considered, it is clear that the refusal to call a hearing to consider the establishment of an individual handler pool was not arbitrary or capricious. The reasons for denying the request for a hearing on an individual handler pool were stated in the Department's letter dated May 25, 1976, to petitioner Lamers as follows (Ex. C attached to Appeal):

(1) Individual handler pooling was thoroughly considered at the 1967 promulgation hearing on the Chicago Regional order and an amendment hearing in 1969. Marketwide pooling of returns to producers was found to be more appropriate than individual handler pooling on the basis of each of these public hearing records. The basic market situation alluded to in the July 13, 1970, decision on the latter hearing (35 F.R. 11494) as the basis for marketwide pooling has not changed. About 80 percent of the milk supply for the market is assembled at supply plants and the remaining

20 percent is received directly from farms at distributing plants. In this situation, the reserve supply is associated with supply plants. Therefore, if individual handler pooling were provided, those producers associated with supply plants would be burdened with carrying virtually all of the market's lower valued reserve.

Marketwide pooling effects uniform sharing of the proceeds from the higher valued Class I sales among producers. There is no indication of producer support for a different basis of distributing the market's proceeds among producers. Moreover, the information contained in your supporting statement indicates that the reserve supply on the market is not uniformly distributed among plants -- the basic market circumstances which led to the conclusion that marketwide pooling should be provided under the order. Accordingly, there is every indication that present circumstances in the market continue to support marketwide pooling under the order.

Petitioners also contend for the first time on appeal that the Act does not authorize provisions establishing minimum pool plant shipping requirements (Appeal, pp. 15-16). Since this issue is raised too late, it cannot be considered on appeal. Petitioners' contention in this respect is, however, totally inconsistent with their argument that higher pool plant qualification standards should be established.

For the foregoing reasons, the relief requested by petitioners should be denied.

ORDER

The relief requested by petitioners is denied and the petition is dismissed.

Done at Washington, D.C.
March 9, 1977

Donald A. Campbell
Judicial Officer
Office of the Secretary

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	
	)	AMA Docket No. M 30-2
Lamers Dairy, Inc. & Jerome Fischer d/b/a Utschig Dairy	)	
	)	Decision and Order
Petitioners	)	

PRELIMINARY STATEMENT

This is a proceeding brought pursuant to the provisions of section 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601 et seq.), sometimes hereinafter referred to as the "Act".

As herein pertinent, section 8c(15)(A) of the Act provides:

> (A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

The Petition, filed July 23, 1974, by the Petitioners was subsequently amended by Amended Petition for Exemption From Federal Milk Order No. 30 filed September 11, 1974. Petitioners' Amended petition alleges that

Order No. 30 is illegal and unconstitutional as applied to them. Order No. 30 regulates the handling of milk in the Chicago Regional Marketing area.

Respondent's Answer to the Amended Petition was filed October 16, 1974, together with a Motion to Dismiss Portions of the Amended Petition. On November 15, 1974, Petitioners filed a "memorandum of Petitioners in Opposition to Respondent's Motion to Dismiss Portions of the Amended Petition". Subsequently there was filed, a "Respondent's Response to Petitioners' Memorandum in Opposition to Motion to Dismiss Portions of the Amended Petition." A letter reply thereto was filed December 13, 1974 by Petitioners. Respondent's Motion to Dismiss Portions of the Amended Petition was denied by the Administrative Law Judge on March 7, 1975, and the case was designated for a Prehearing Conference. Prehearing Conferences were held on April 10, 1975, in Milwaukee, Wisconsin. and on June 24, 1975, in Washington, D.C. A hearing was held September 4, 1975, in Milwaukee, Wisconsin.

Thereafter, a series of pleadings were filed and, in due course, the Administrative Law Judge, on January 6, 1976, designated the time for filing briefs, which time was extended subsequently, the last brief having been filed in May of 1976.

Respondent's Motions filed April 12, 1976, i.e., "Respondent's Motion for Official Notice" and "Respondent's Submission of Exhibits and Motion for Admission" are hereby granted.

From the time of the commencement of this proceeding though the filing of their Reply Brief on May 11, 1976, 1/ Petitioners were represented by Roy J. Josten, Esquire, Stewart, Peyton, Crawford, and Josten, 840 Lake Avenue, Racine, Wisconsin, and the Respondent was represented by Edward M. Silverstein, Esquire, Office of General Counsel, United States Department of Agriculture, Washington, D.C.

1/ Thereafter, on May 18, 1976, Petitioners filed an additional "brief" pro se.

Having given due consideration to the pleadings, the certification rulings filed November 4, 1975, the Stipulation on the Record filed November 26, 1975, and the entire record herein, the findings of fact to follow are hereby made.

FINDINGS OF FACT

1. Petitioner Lamers Dairy Inc. is a Wisconsin corporation engaged principally in the business of bottling fluid milk for distribution and sale to retail customers in and around the Appleton, Wisconsin metropolitan area. Said Petitioner has its place of business at 114 South John Street, Kimberly, Wisconsin 54136, and receives its raw milk supply directly from dairy farmer producers. Richard J. Lamers is the president and chief executive office of said Petitioner. Al of said Petitioner's sales are within the State of Wisconsin.

2. Petitioner Fisher is an individual engaged principally in the business of bottling fluid milk for distribution and sale to retail customers in and around the Appleton, Wisconsin metropolitan area. Said Petitioner has his place of buisness at 2003 North Meade Street, Appleton, Wisconsin 54911 and receives his raw milk supply directly from dairy farmer producers. All of said Petitioner's sales are within the State of Wisconsin.

3. Since July 1, 1968, Petitioners have been determined to be handlers under Order No. 30 by the Federal Milk Market Administrator of the Order who is the agent for the Secretary and charged with the administration of the Order. Also, Petitioners had been regulated handlers pursuant to the provisions of Order No. 45 prior to July 1, 1968.

4. The determination, by the Market Administrator, that Petitioners are handlers under the Order was based on substantial evidence.

5. Petitioners are in competition with cooperative associations of milk producers and other independent handlers for their supply of Grade A raw milk from dairy farmers and, in selling, at retail and wholesale,

bottled fluid milk and milk products within the vicinity of Appleton, Wisconsin.

6. The provisions of the Order as to the establishment of a "producer-settlement fund" and its operation are in accord with the provisions of the Act and are constitutional.

7. The "pool plant" provision" of the Order during the pertinent period of time was and is based on substantial evidence.

8. The Class I price provision of the Order during the pertinent period of time was and is based on substantial evidence.

9. As a result of public hearings held upon a proposed order, and on proposed amendments thereto, regulating the handling of milk in the Chicago Regional marketing area, the Secretary of Agriculture found that all milk and milk products as defined in the Order are in the current of interstate commerce or directly burden, obstruct, or affect interstate commerce in milk or its products.

10. The evidence ruled admissible herein by the Judicial Officer consists, in essence, of the general testimony by the two Petitioners relating to their businesses.

11. The United States Department of Agriculture's policy has been determined to be:

> "* * *that when the lawfulness of the Order itself or a provision thereof is attacked, the Act affords no trial de novo by way of the 8c(15)(A) petition. The Order must stand or fall upon the basis of the evidence before the Secretary adduced during the promulgation proceedings, and additional evidence is not relevant or admissible in the 8c(15)(A) proceeding.* * *" (Emphasis added) In re: Andrew W. Leonberg, 32 A.D. 763(1973).

12. Based upon the evidence herein, Petitioners have

not met their burden of showing that the obligations from which they seek to be excluded are "not in accordance with law." Their proof is insufficient.

CONCLUSIONS

Among Petitioner's allegations are those relating to the alleged unconstitutionality of the Act, particularly with respect to their assertion that there has been the taking of private property for private use without just compensation.

The Petitoners further maintain that they have no obligation to pay amounts into the producer settlement fund of Order No. 30; that they are entitled to receive back all monies so paid since January 1, 1972; and, that they should be exempted from the provisions of the Order. Their proposed findings and argument with respect thereto are postulated upon asserted facts which have not been established in this proceeding. 2/

The testimony of Petitioner Lamers indicated, inter alia, that Petitioner Lamers had five producers shipping milk to his plant; that said Petitioner had a distribution plant; that when milk was sold in bottled form all of such milk was sold within the State of Wisconsin; and, that said Petitioner was in competition with several cooperatives. The witness Jerome A. Fischer, d/b/a Utschig Dairy, and owner thereof, testified, inter alia, that he received all his milk from within the State of Wisconsin and that all of his sales were to parties within the State of Wisconsin; that he was experiencing competition at the buying end and had to pay over the Order price to get milk.

The Petitioners concede that in an action brought pursuant to section 8(c)(15)(A) of the Act, the burden is on Petitioners to sustain their burden of proof. The

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2/ By ruling upon certification to the Judicial Officer (November 4, 1975), it was decided that only certain evidence properly was admissible in this "review" proceeding. See footnote 3, infra.

standard for adjudication is, "whether an order, a provision thereof, or an obligation imposed in connection therewith is in accordance with law." The burden of proving that it is not in accordance with law is upon the petitioner who so alleges.

It is well established that a proceeding of this nature does not emcompass questions of policy, desirability, or soundness of the regulatory scheme of an order, nor is it considered a forum for re-evaluation of economic and marketing conditions.

Petitioners assert several defenses to payment of the amounts in question on Constitutional grounds and one defense alleging an invalid classification of Petitioners as "handlers" under the Act and Order.

Basically, Petitioners maintain that under Order No. 30, the Secretary has fixed the Class I price too high and has provided unreasonably low supply plant qualification standards. Furthermore, Petitioners contend that certain cooperatives exercise absolute control over Federal Milk Order No. 30 rather than the Secretary, constituting an unlawful delegation of power. It is asserted that these actions by the Secretary give competing cooperatives an economic advantage over Petitioners. It is further contended that by reason of the actions complained of, the Order does not tend to effectuate the declared purposes of the Act.

The evidenciary materials 3/ which have been

3/ By "Stipulation on the Record" dated November 23, 1975, Counsel for the respective parties stipulated and agree, inter alia, as to matters relating to official notice; inclusion in the record of referenced promulgation or amendment hearings and any documents attached to briefs.

In addition, by Ruling on Certification to Secretary of Judge's Proposed Rulings, filed November 4, 1975, the evidence which was ruled admissible was the general testimony by the two petitioners relating to their businesses (Tr. 110, line 20 through Tr. 112, line 24;

[Footnote, cont'd next page.]

admitted into evidence or which have been the subject of official notice herein do not sustain the Petitioners' proposed Findings of Fact Nos. 5, 6, 7, 8, and 9, without which, the merits of Petitioners' position and arguments lack established factual basis in this proceeding. Accordingly, it must be concluded that Petitioners have failed to show in this administrative

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3/ cont'd

Tr. 114a, line 23 through Tr. 116, line 13; Tr. 116, lines 19-20). The other evidence proffered by petitioners at the oral hearing was deemed to relate to the wisdom or efficacy of the Federal Order provisions. It was further state, inter alia, in the aforesaid ruling:

"The petitioners have misconceived the basic nature of a review proceeding under 8c (15)(A) of the Agricultural Marketing Agreement Act of 1937 (7U.S.C. 608c (15)(A)). An action brought pursuant to 8c(15)(A) of the Act is not a trial de novo but rather is a proceeding to review the record, on which the challenged administrative decision is based, to determine whether the administrative decision is based on substantial record evidence. Wawa Dairy Farms v. Wickard, 56 F. Supp. 67, 70 (E.D. Pa.), affirmed, 149 F.2d 860, 862 (C.A.3); Windham Creamery, Inc. v. Freeman, 230 F. Supp. 632,633 (D. N.J.), affirmed, 350 F.2d 978 (C.A. 3,) certiorari denied, 382 U.S. 979. See, also, In re College Club Dairy Inc., et al., 15 Agriculture Decisions 367,371 (1956).

"The petitioners have the right to contend in this proceeding that the Class I price under Federal Order No. 30 is too high and that the pool plant qualification standards are too low. But the question is, upon what record is the determination as to the validity of such Order provisions to be made?

"It has been settled for more than 30 years that evidence such as that proffered by petitioners in this case is not admissible in a review proceeding under Section 8c(15)(A) of the Act. * * *"

proceeding that the determinations of which they complain are not in accordance with law.

With due consideration to the above mentioned principles, the Administrative Law Judge has no alternative but to reject, on the basis of the evidence in this proceeding, the assertions of Petitioners to the effect that "they had no obligation to pay the amounts * * * due the producer settlement fund and the other Order 30 funds * * *." To do otherwise would be contrary to what has been declared to be Departmental policy and would involve, inter alia, an evaluation of economic and marketing conditions which have already been evaluated by the Secretary and thus would fall within the proscription of reopening the promulgation hearing(s) instead of judging them. See Andrew W. Leonberg, 32 A. D. 763 (1973). The remedy, as stated therein, is:

> "The Judicial Officer's decision on any 8c(15)(A) petition is reviewable under Section 8c(15)(B) of the Act (7 U.S.C. 608c (15) (B)), which provides that:
>
> > (B) The District Courts of the United States in any district in which such handler is an inhabitant, or has his principal place of business, are vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. * * * If the Court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or

> > (2) to take such further proceedings as, in its opinion, the law requires."

All contentions of the parties presented for the record have been considered whether or not specifically mentioned herein, and any motions, suggestions, reqeusts or proposals inconsistent with this decision are denied.

ORDER

The relief requested by Petitioners is denied and the petition is dismissed.

Pursuant to the Rules of Practice Governing Proceedings on Petitions to Modify or to be Exempted From Marketing Orders, this decision and Order shall become final without further proceedings thirty-five (35) days after the date of service thereof, unless there is an appeal to the Secretary by a party to the proceeding within thirty (30)days after service thereof, as provided by the Rules of Practice.

Copies hereof shall be served upon the parties.

Done at Washington, D.C.,
this 27th day of September, 1976.

Dorothea A. Baker
Administrative Law Judge

Supreme Court, U. S.
FILED
JAN 29 1980
MICHAEL RODAK, JR., CLERK

No. 79-890

In the Supreme Court of the United States

OCTOBER TERM, 1979

LAMERS DAIRY, INC., AND JEROME FISCHER
d/b/a UTSCHIG DAIRY, PETITIONERS

v.

SECRETARY OF AGRICULTURE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-890

LAMERS DAIRY, INC., AND JEROME FISCHER
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner contends that the producer-settlement fund provided for by Section 8c of the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 601, 608c,[1] and the Federal Milk Order promulgated thereunder by the Secretary of Agriculture for the Chicago marketing area are unconstitutional.

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[1]Section 8c provides in relevant part (7 U.S.C. 608c):

(1) The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in this chapter as "handlers." Such

1. This is an action under Section 8c(15)(B) of the Act, 7 U.S.C. 608c(15)(B), to review the Secretary of Agriculture's dismissal of a petition challenging the

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orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof.

* * * * *

(5) In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) no others:

(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers.

(B) Providing:

* * * * *

(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered;

subject * * * only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, * * * and (f) a further adjustment, equitably to apportion the total value of milk purchased by all handlers among producers on the basis of their marketings of milk, which may be adjusted to reflect the utilization of producer milk by all handlers in any use classification or classifications, during a representative period of one to three years, which will be automatically updated each year. * * *

validity of Federal Milk Order No. 30.[2] That Order, among other things, establishes a producer-settlement fund under which producers delivering milk to handlers within the Chicago marketing area receive uniform prices for their milk.

Petitioners are handlers or distributors of milk who complain that the pooling arrangement of the producer-settlement fund, in which their participation is obligatory under the Order, results in the taking of their property without just compensation in violation of the Fifth Amendment. The district court, both initially (Pet. App. 7-15) and on reconsideration (*id.* at 5-6), rejected this argument and granted summary judgment for the government, noting that the same contention was considered and rejected by this Court in *United States* v. *Rock Royal Co-Operative*, 307 U.S. 533 (1939). The court of appeals, after identifying this broad constitutional challenge as the "sole issue on appeal" (Pet. App. 1),[3] affirmed the district court's ruling. In doing so, the court of appeals stated that "[t]he constitutionality of the producer-settlement fund provided for by Congress in Section 8c(5) of the Act was expressly approved by the Court in *Rock Royal*" (Pet. App. 2). The court also rejected petitioners' plea that it "decline to follow the decision in *Rock Royal* on the ground that its vitality has been eroded by economic changes in the dairy industry during the forty years since the Supreme Court decided that case" (Pet. App. 3). The court observed that it regarded the "arguments in this context to be properly addressed to the Congress, not the federal courts" (*ibid.*).

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[2]Judicial review is available to determine whether the disputed administrative ruling is "in accordance with law." See, *e.g.*, *Lewes Dairy, Inc.* v. *Freeman*, 401 F. 2d 308 (3d Cir. 1968), cert. denied, 394 U.S. 929 (1969).

[3]Several additional claims were made and rejected in the district court but were not pursued on appeal (Pet. App. 10-15).

2. The court of appeals correctly concluded that petitioners' claims are foreclosed by this Court's decision in *Rock Royal*. The ruling below does not conflict with any decision of the other courts of appeals. Further review of the decision in this case is therefore unwarranted.

Petitioners acknowledge (Pet. 23-25) that their precise claim was considered and rejected by the Court in *Rock Royal*. They contend, however (Pet. 25-27), that "changed circumstances" have rendered the *Rock Royal* decision obsolete and that the matter should therefore be reviewed anew. Quite apart from the fact that the putative "changed circumstances" upon which petitioners rely are presented as facts without record or other citation (see Pet. 25-27; Pet. App. 23),[4] it is apparent that the decision in *Rock Royal* did not turn upon the presence or absence of particularized market conditions. Rather, the Court addressed Congress' power to legislate under the Commerce Clause and set forth general principles that undeniably remain as valid now as when *Rock Royal* was decided. Thus, in terms that accurately describe petitioners' challenge here, the Court in *Rock Royal* characterized the contentions made in that case as follows (307 U.S. at 571-572):

> The defendants' objection * * * is to the alleged deprivation of liberty and property accomplished by the pooling requirement in taking away from the defendants their right to acquire milk from their

[4]In any event, the factors petitioners mention in this connection more appropriately bear on the issue whether there is substantial evidence to support the Order. The district court found substantial evidence to support the one aspect of the Order that was challenged (Pet. App. 15), and petitioners have since abandoned their challenge to the Order on substantial evidence grounds.

> patrons at the minimum class price, according to its use, and forcing the handlers to pay their surplus, over the uniform price, to the equalization pool instead of to their patrons. This argument assumes the validity of price regulation, as such, but denies the constitutionality of the pooling arrangement because handlers are not at liberty to pay the producer in accordance with the use of the producer's milk but must distribute the surplus to others whose milk was resold less advantageously. It is urged that to carry this principle of contribution to its logical conclusion would mean that the wages of the employed should be shared with the unemployed; the highly paid, with the underpaid; and the receipts of the able, the fortunate and the diligent, with the incompetent, the unlucky and the drone.

The Court then upheld the producer-settlement fund on grounds that compel the same result today (307 U.S. at 572-573):

> No such exaggerated equalization of wealth and opportunity is proposed. The pool is only a device reasonably adapted to allow regulation of the interstate market upon terms which minimize the results of the restrictions. It is ancillary to the price regulation designed, as is the price provision, to foster, protect and encourage interstate commerce by smoothing out the difficulties of the surplus and cut-throat competition which burdened this marketing. In *Mulford* v. *Smith*, [307 U.S. 38 (1939)] we made it clear that volume of commodity movement might be controlled or discouraged. As the Congress would have, clearly, the right to permit only limited amounts of milk to move in interstate commerce, we are of the opinion it might permit the

movement on terms of pool settlement here provided.

> Common funds for equalizing risks are not unknown and have not been considered violative of due process. The pooling principle was upheld in workmen's compensation, bank deposit insurance, and distribution of benefits in the Transportation Act.

It can still be said that "[c]ommon funds for equalizing risks are not unknown," and it is simply too late in the evolution of Congress' power to legislate in the area of interstate commerce to gainsay the Act's validity. Thus, the court of appeals was plainly correct in admonishing petitioners to seek congressional relief if they wish to eliminate this manner of regulation in the dairy industry on the basis of changed circumstances. See *National Broiler Marketing Ass'n* v. *United States*, 436 U.S. 816, 827 (1978).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

JANUARY 1980

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Supreme Court, U.S.
FILED
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No. 79-890

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

Lamers Dairy, Inc., and Jerome Fischer
d/b/a Utschig Dairy, Petitioners

v.

Secretary of Agriculture

On Petition For A Writ of Certiorari To
The United States Court of Appeals For
The Seventh Circuit

REPLY MEMORANDUM FOR THE PETITIONERS IN ANSWER TO THE RESPONDENT'S MEMORANDUM IN OPPOSITION

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REPLY MEMORANDUM FOR THE PETITIONERS IN ANSWER TO THE RESPONDENT'S MEMORANDUM IN OPPOSITION

The respondent's Memorandum in Opposition to the above cited petition is inaccurate, inconsistent and therefore misleading and must be answered. One must keep in mind that it was this Court in Nebbia v. New York, 291 U. S. 502 (1938) at page 525 that said in essence that governmental regulation for public welfare shall not be unreasonable, arbitrary, or capricious, and must have a real and substantial relation to the objects sought to be attained, and the reasonableness of each regulation depends upon the relevant facts (Pet. 20).

It is also this Court which stated (Pet. 22) in Shoemaker v. United States, Dist. Col. 1893, 13 S. Ct. 361, 147 U. S. 298, 37 L. Ed. 170:

> "The courts have power to determine whether the use for which private property is authorized by the legislature to be taken is in fact a public use." (Emphasis added.)

1. It is of no surprise that the courts below followed this Court's decision in Rock Royal.

> "District Courts and Courts of Appeals must follow decisions and interpretations of Supreme Court in spite of any individual predilections that may exist." United States v. Chase, 281 F. 2d 225 (7th Cir. 1960).

Therefore, the fact that the lower courts followed this Court's decision in Rock Royal should have no bearing on whether or not this case is reviewed by this Court.

2. The respondent says at page 4 of his memorandum: "The ruling below does not conflict with any decision of the other courts of appeals." The petitioners wish to remind this Court that the ruling below does conflict with this Court's decision in Shoemaker v. United States cited above. Changed circumstances are the relevant facts which are material to the administration of justice, and no one can go to the Congress of the United States in search of justice. This can only be found in the courts, and the petitioners believe that the courts below misinterpreted the Supreme Court ruling in National Broiler Marketing Association v. United States, 436 U.S. 816, 827 (1978). (Pet. 21, 22)

3. It is stated in the respondent's memorandum at page 4: " . . . it is apparent that the decision in Rock Royal did not turn upon the presence or absence of particularized market conditions." This is not true, for in the respondent's memorandum at page 5 he quotes Rock Royal where it is stated:

> " . . . It is ancillary to the price regulation designed, as is the price provision, to foster, protect and encourage interstate commerce by smoothing out the difficulties of the surplus and cut-throat competition which burdened this marketing."

This means that the Court did take into consideration the

cut-throat competition which burdened the market at that time. As this statement is made in reference to the producer settlement fund, it is therein seen that the producer settlement fund was to prevent producers from bidding lower prices for milk, thereby protecting the less efficient producers from being driven out of the marketplace by more efficient competition and endangering the supply of milk for the New York market. (It also prevents producers from selling milk at a price below artificially high prices established by regulation.)

Further, Justice Reed says in Rock Royal under "Adoption of the Order":

> "Both the Agency and the League announced repeatedly that handlers would be required to pay uniform price and that no handler would receive a competitive advantage over the others."

He further states under "Correlation of the Order and the Act":

> "Whether by cooperative or not, the defendant corporations have no financial interest in the producer settlement fund. All defendants pay into, or draw out of, that fund in accordance with their utilization of the milk delivered to them by their patrons. The defendants profit or loss depends on the spread each receives between the class price and the sale price." (Emphasis added.)

When these statements from Rock Royal of the relevant facts are compared to the material facts to the consideration of the questions presented (Pet. 11 et al.) it becomes clearly evident that this Court in 1939, did not foresee the possibility of competitive inequity and subsidation between the fluid portion of the industry versus the manufacturing portion of the industry which could result. This Court could not foresee in 1939 that

a) cooperatives through the power of block voting for their members could control decisions by the Department of Agriculture with the threatened non-existence of

federal orders through their voting power.

b) That through this control they could manipulate decisions on the setting of price structures and other regulations under the orders.

c) That control of the setting of prices under federal regulation could result in further competitive inequities, subsidation to manufacturing handlers from the fluid portion of the industry, and undue price enhancement in the form of regulated artificially high Class I prices.

d) That the underlying inequities in this system could lead to monopoly control over markets where one major cooperative alone now controls over ten percent of this nation's milk supply and that this monopolization, if allowed to continue, can virtually destroy the free enterprise system in the area of milk marketing (Pet. 28).

This Court did consider the presence of particularized market conditions in Rock Royal, contrary to the opinion of the respondent.

4. Respondent also states at page 4 that "'changed circumstances' upon which petitioners rely are presented as facts without record or other citation (see Pet. 25-27; Pet. App. 23)." This is not true.

First and foremost, it is the petitioners' understanding that a petition presents only the facts as it is not a brief on the merits and that it is in a "brief on the merits" that the facts are supported by record, public statistics, federal decisions, and common knowledge which the petitioners intend to use in detail upon the granting of a review by this Court. The petitioners did not cite or quote the record because the Supreme Court does not have the record at this point in time and will not have it until after the granting of a writ of certiorari.

The respondent relies on the Department of Agriculture decision cited at Petitioner's Appendix 23 which states: "Petitioners contend that the economic conditions relating to milk production and marketing are not the same as they were in 1939 when the Rock Royal case sustained the constitutionality of market-wide pooling under the Act. However, petitioners cite no evidence in support of their argument from the promulgation hearing

records upon which the Order and its amendments are based. As shown below, the validity of the Order must be tested, from an evidentiary standpoint, solely on the basis of the evidence adduced at the promulgation hearings . . ."

To fully understand this conclusion by the Department of Agriculture, the Court should know that the petitioners herein have been regulated by federal milk marketing orders for over twenty years and have partaken in approximately twelve federal order hearings, and in these hearings have testified as to the inequities and the unfairness of the regulations involved. The petitioners twice petitioned the Department of Agriculture in 1973 and in 1976 for an "individual handler pool" which does not take money between handlers and the Department refused hearing. Reason for the refusal of the hearings was that "the cooperatives would not approve an Order with an individual handler pool", with no considerations to the inequities involved.

This Court should also understand that in promulgation hearings, the hearing officer does not have the power of contempt of court nor the power of subpoena and therefore, under cross examination, witnesses can falsify evidence and not be made to answer questions which would show their testimony false, which has happened on many occasions. Most importantly, promulgation hearings cannot be held for the purpose of challenging the constitutionality of the Act, and therefore changed circumstances raised as evidence in federal order promulgation hearings as to the constitutionality of the Act are irrelevant. This evidence can only be brought in a hearing before the Department of Agriculture in its quasi-judicial rather than in its quasi-legislative capacity.

In administrative remedies procedures under the Department's quasi-judicial capacity, the petitioners herein brought in seven witnesses to testify as to the changed marketing conditions relative to the constitutional issues including expert witness Dr. Roland Bartlett, professor of agriculture economics with the University of Illinois. All of the testimony brought by the petitioners to the Department of Agriculture was refused as

evidence as the Department of Agriculture held that the only evidence that could be brought was that which was raised in promulgation hearings. Petitioners then proceeded to cite promulgation hearing records which proved the inequities and changed circumstances in the system and the Secretary misconstrued the purpose of the evidence and made a decision on whether or not there were substantial grounds to support the orders. (See Res. Memo. 4, footnote 4) The petitioners in fact never challenged the existence of the Orders or whether or not they were based on substantial evidence. Rather, the petitioners' challenge to the orders is on the inequities in the system involving the constitutionality of the producer settlement fund. This was the Secretary's way of circumventing the issue and the evidence cited.

The justification for the taking of private property among handlers was for the public purpose of assuring the consuming public of adequate supplies of milk in the New York market by using the equalization fund as a common fund for the purpose of preventing "cut-throat competition which burdened that marketing". That purpose no longer exists with the amendment in 1954 to the price support system, 7 U.S.C. Section 1446b and 1446c with authorizes the purchase of dairy products to accomplish this end. This is a matter of law and does not require record evidence. These are clearly changed circumstances (See Pet. 7, 8, 14, 18, 26, 27).

5. We will next cite three passages in the respondent's memorandum which are related and are not true. Respondent states at page 3: "That Order [30], among other things, establishes a producer-settlement fund under which producers delivering milk to handlers within the Chicago marketing area receive uniform prices for their milk." At page 4 they state: "Thus, in terms that accurately describe petitioners' challenge here, the Court in Rock Royal characterized the contentions made in that case as follows . . ." At page 6 they state: "It can still be said that 'common funds for equalizing risks are not unknown'."

The petitioner will clarify these statements. First, the description in Rock Royal is not accurate of today's

circumstances. The Court in 1939 was of the belief that there would be no competitive inequities involved in the system, and as seen in the petitioners' petition at pages 8-18, this is not true today. The portion of Rock Royal cited talks about "equalization of wealth". One must understand that we are dealing with two different areas of wealth or economics. One is that of the producer and the price that he receives for his milk. The second is the area of the handler and the monies he earns in his business in the competitive market relative to the manipulation of artificial prices established under regulation at the purchase level and in a free competitive system at the consumer level.

We shall first examine producer economics. Uniform prices established by regulation in Order 30 are below the price that producers receive on the competitive buying market. Competition for producer milk results in premiums of $.20 to over $.50 per hundredweight being paid to producers over and above marketwide blend prices. Competition for producer milk has always established a higher price to the producer than that established by the federal order. If a producer does not receive a higher than market blend price in the way of an absolute price, he then receives free services, free hauling, etc. to compensate him for the difference. We should add that this has also been the result of over-order premiums extracted by cooperatives from handlers through super pools where they have monopolized the market.

There is no producer, to the petitioners' knowledge, that has ever received any monies from the producer settlement fund. The monies from the producer settlement fund are paid only to handlers and the handler then uses this money to buy milk in a competitive market buying situation. Thus the pool negates the purpose of the Class I differential to attract milk for fluid use (Pet. 17). Thus, as the monies paid from the producer settlement fund are paid to handlers, it serves competing handlers.

Second, relative to dairy economics, dairy journals publicize financial reports from larger dairies which list net profits and net sales for the respective reporting period. The net profits generally calculate in the range

of 0.2% to 0.6% of sales. With these kinds of competitive operating margins existing in the dairy business with the subsidizing picture shown to the Court in the petitioners' petition at page 12 et al., it can be understood how the equalization pool is a tool which can be effectively used to monopolize markets.

The issue presented by the petitioners is constitutional in nature and changed circumstances relative to the public purpose justification of the producer settlement fund have been made obsolete by law (7 U. S. C. Section 1446b and 1446c). As the question is constitutional in nature, it is one that must be dealt with by this Court and cannot be dealt with by Congress.

Following is an example of some of the many problems encountered as a result of the equalization pool in federal milk marketing orders. The Community Nutrition Institute just recently petitioned the Secretary of Agriculture for a change in all federal milk marketing orders to allow dairies to use powdered milk for reconstituted milk without reclassification. This would mean to leave the powdered milk price at the lower Class III price levels rather than being reclassified at artificially high Class I prices when reconstituted by a dairy for resale as fluid milk. The purpose of this is to allow consumers to be able to buy reconstituted powdered milk cheaper than fresh fluid milk. This is an example of consumer rebellion against unjustified artificially high Class I prices charged by order regulation and cooperative super pools.

A Supreme Court ruling that the pool is no longer justifiable and thus unconstitutional will eliminate many problems faced in the dairy industry. It would help to fight inflation. It would help the industry to become more economical by eliminating inefficient practices of hauling milk for the purposes of qualifying that milk for pool and gaining subsidies. It would simplify the administration of federal orders, and above all, it would protect the right to private property in the free enterprise system which our forefathers sought to protect in the framework of the constitution. This in turn would allow competition to reduce Class I prices to realistic levels while the producer

is still protected through the price support system.

If, in the area of regulating commerce, circumstances change which result in provisions of regulation being used to violate the provisions of the Fifth Amendment of the Constitution, it is the courts which must recognize this abuse and take the necessary action to prevent inequities and preserve competition which this country urgently needs to protect both the farmers and the consumers from the results of monopolies.

It is the petitioners' prayer that this Court hear and see the evidence so as to allow an unbiased opinion, free of the prejudice petitoners experience in the Department of Agriculture and free of judicial precedent which burdened the lower courts.

It is therefore respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted this 7th day of February, 1980, at Kimberly, Wisconsin.

Richard J. Lamers

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